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No. _____

Supreme Court of the United States

OCTOBER TERM, 1992

Wm. F. McCOLLOUGH et ux., Petitioners,

vs.

A.G. EDWARDS & SONS, Inc., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where statutory tort claims are submitted to arbitration under a pre-dispute contract containing an arbitration clause, the arbitrators' award contains neither findings and conclusions nor any reasoned explanation of the decision, and the record strongly suggests that the award was influenced by legal contentions of the prevailing party which are clearly erroneous under applicable statutory law, may the district court, in order to ensure that the dispute is resolved in accordance with statutory law, vacate the award?

2. Where the party defending statutory tort claims in an arbitration proceeding conducted pursuant to a pre-dispute arbitration agreement asserts multiple facially invalid defenses, at least some of which he knows or should know to be invalid under applicable statutory law, and an arbitral award in favor of the defending party is procured through such conduct, may the district court vacate the award?

3. Even if, as the Court of Appeals' opinion puts it, "offering a meritless defense is part and parcel of the business of litigation," when a party defending a statutory tort claim in arbitration both offers and emphasizes a defense which is meritless under applicable statutory law, does the principle that by agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute require that an ensuing award in favor of the defending party be subject to vacatur at the award-enforcement stage?

LIST OF PARTIES

The parties to the proceedings below were Petitioners William F. McCollough and Jeanene McCollough and Respondent A.G. Edwards & Sons, Inc., a Delaware corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners William F. McCollough and Jeanene Mccollough respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, with respect to which a timely Petition for Rehearing was denied on July 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 967 F. 2D 1401, and is reprinted in the appendix hereto, p. A.1, *infra*. The opinion of the District Court for the District of Arizona (Rosenblatt, D.J.) is reported at 764 F. SUPP. 1365, and is reprinted in the appendix hereto, p. A.8, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 9 U.S.C. § 9, Respondent A.G. Edwards & Sons, Inc. ("Broker") brought action in the District of Arizona to confirm an arbitrators' award, and Petitioners McCollough ("Investors") crossclaimed seeking vacatur of the award. The District Court vacated the award and ordered re-arbitration before a new panel of arbitrators.

Broker initiated a timely appeal to the Ninth Circuit Court of Appeals, under 9 U.S.C. § 16 (a) (1) (E). The Ninth Circuit, on June 26, 1992, entered a judgment and opinion reversing the district court's judgment and directing that the arbitrators' award be confirmed. Investors filed a timely petition for rehearing, which the Ninth Circuit denied on July 28, 1992.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

15 U.S.C. § 77n, [Securities Act of 1933, § 14]:

Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules or regulations of the Commission shall be void.

15 U.S.C. § 78cc, [Securities Exchange Act of 1934, § 29]:

(a) Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

9 U.S.C. § 10:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioners McCollough ("Investors") are a retired couple in their 60s. They first opened an account with Respondent A.G. Edwards, Inc., a securities broker-dealer ("Broker") in 1985. The account out of which the present controversy arises was opened in 1986. Their stated investment objectives, as recorded by Broker in the account records, were, in order of priority, first, safety of principal, second, growth and third, income.

On October 19, 1987, open option positions on Investors' account were closed, to their loss, on that day, of more than $900,000. All of Investors' other assets in Broker's hands were liquidated, and the net result was an account balance owing from Investors to Brokers of almost $260,000. Investors alleged, but Broker denied, that the trades resulting in the loss were unauthorized.

On November 2, 1987, at Broker's offices, an in-house collection attorney representing Broker presented to Investors a note giving them 90 days to pay. The note

contained general release language, pursuant to which Investors purportedly waived all claims of any nature against Broker. Investors signed the note without knowing of any potential claims or causes of action which they might have under the securities laws.

Investor's original customer agreement with Broker, a printed form prepared by Broker, included a provision for arbitration of any claims which might be asserted by Investors. Pursuant to this pre-dispute agreement, Investors submitted an arbitration request to the New York Stock Exchange in October, 1988.

Investors alleged violations of Section 10 (b) of the Securities Exchange Act of 1934 and regulations thereunder, Arizona securities statutes, the Arizona Consumer Fraud Act, Arizona "mini-RICO" law and federal RICO statutes. Broker counterclaimed for the balance due on the November 2, 1987 note. Arbitration hearings before a three-man panel consisting of one practicing attorney, one retired banker and one retired phone company executive were held at Phoenix in the fall of 1990.

In its defense, Broker asserted: that contributory negligence was a defense to Investors' claims, including the Arizona blue sky claims; that Broker's "good faith" was a defense to Investors' claims, including the Arizona blue sky claims; that Investors could have no private right of action under the Arizona Consumer Fraud Act if the alleged misconduct was also violative of Arizona securities statutes; and that even if Broker had been liable to pay damages to Investors under state or federal securities statutes or otherwise, the general release language of the November 2, 1987 "note and release" was a binding and

effectual waiver of any such claim. None of these defenses was ever withdrawn by Broker.

The waiver defense based on the "note and release" was strongly emphasized by Broker throughout the hearing, including closing arguments. However, the uncontroverted evidence was that not only Investors but also Broker's attorney and branch office manager, who represented Broker in connection with the note and release, had no knowledge concerning Investors' potential state and federal securities law claims when the note and release was executed. Broker's distinguished counsel, laying the "note and release" before the banker and the phone company executive, presented common law waiver and release arguments wholly without regard to the special requirements of securities law, in effect contending that a post-transaction waiver which would be binding in the context of an ordinary sale of goods or similar commercial transaction must also be effective in the context of a securities transaction.

Two of the arbitrators concurred in a three-line award whereby Investors took nothing and their liability to Broker on the note was upheld. No findings, conclusions or explanations were given, and no reasons for the award were stated. The third arbitrator (the practicing attorney) dissented and indicated that he would grant Investors' claim, including treble damages under state law, plus expenses.

Broker then commenced a district court action under the Federal Arbitration Act to enforce the award, and Investors contested that action, seeking vacatur of the award. The district court, Hon. Paul G. Rosenblatt, was under the impression that the arbitrators' error in the application or interpretation of securities statutes would

not constitute grounds for vacatur of the award. Although Investors complained of the legal invalidity of the four defenses asserted by Broker and discussed above, Broker made no attempt to establish their validity.

The district court found that certain of these defenses were "facially meritless" and that Broker "knew or should have known" of the invalidity of at least two of them, and concluded that under the circumstances Broker's assertion of "multiple facially meritless defenses constitutes procurement of an award by 'undue means' within the meaning of 9 U.S.C. § 10 (a) [1]." Accordingly, the district court vacated the award and remanded the matter for arbitration before a new arbitral panel. Broker appealed.

On appeal, Investors offered the following alternative argument in support of the district court's judgment. Unlike arbitrators in an ordinary "unrestricted submission" commercial arbitration, arbitrators deciding a statutory tort claim pursuant to a pre-dispute arbitration agreement are bound to decide according to the law. Therefore, if the arbitrators err in the application or interpretation of relevant statutory law and thus do not resolve the dispute in accordance with statutory law, they act beyond their powers and their award is subject to vacatur at the enforcement stage. It remains only to consider by what means error in the application of statutory law must be shown. The extent of the arbitrators' obligation to explain the award is necessarily related to the scope of judicial review of it. Where the arbitrators choose not to render a reasoned decision, error of law *vel non* cannot be shown directly. In such a case, if the defending party relied upon meritless defenses and if the arbitral record discloses a likelihood that the award was influenced thereby, to deprive the district court of the power to vacate such award and compel the court to

enforce it instead would deprive the arbitral process of the minimal integrity which must be maintained. It would also mean that by agreeing to arbitrate a statutory claim a party would not merely be submitting the resolution of his rights to an alternative forum, but also foregoing substantive rights afforded by the statute.

Disregarding Investors' alternative argument entirely, the Court of Appeals held that there was nothing "undue" about Broker's reliance upon defenses which it knew or should have known to be meritless: "Offering a meritless defense . . . is part and parcel of the business of litigation." Moreover, said the Court of Appeals, where a party to arbitration challenges the award on grounds of "undue means," he must prove that an award in favor of the opposing party would not have been rendered but for the undue means resorted to by that party; that such a showing is almost inherently impossible where no reasons for the award are given is merely another reflection of the "extremely limited scope of judicial review of such awards." Accordingly, the Court of Appeals reversed the district court's judgment and directed entry of an order confirming the arbitration award.

REASONS FOR GRANTING THE WRIT

I. IN OVERRULING *WILKO V. SWAN*, 346 U.S. 427 (1953), THIS COURT HAS IMPLICITLY ENDORSED THE *WILKO* MINORITY'S VIEW THAT IN CASES OF THIS TYPE "APPROPRIATE MEANS OF JUDICIAL SCRUTINY MUST BE IMPLIED."

Where the claim submitted to arbitration under a pre-dispute agreement to arbitrate is a claim arising out of statutory rights and protections belonging to the claimant,

which the claimant could not, by any pre-dispute contract, waive or relinquish, the arbitrators must decide in accordance with the statute even if the agreement has no requirement that the arbitrators follow the law. *Wilko v. Swan*, 346 U.S. 427, 433-34, 436, 74 S.Ct. 182, 186, 98 L.Ed. 2d 168 (1953) (point agreed upon by majority as well as Jackson, J., concurring, 346 U.S. at 439, 74 S.Ct. at 189, and Frankfurter and Minton, JJ., dissenting, 346 U.S. 439, 440, 74 S.Ct. 189), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637-38, 105 S. Ct. 3346, 3359-60, 87 L. Ed. 2d 444 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 230, 231-32, 107 S.Ct. 2332, 2340, 96 L.Ed. 2d 185 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 536, 109 S.Ct. 1917, 1920-21, 104 L.Ed. 2d 526 (1989).

Wilko involved an investor's claim for damages under § 12 (2) of the Securities Act of 1933. Justice Reed, writing for the Court, remarked (citing in support a series of "unrestricted submission" contract-dispute cases, decided both before and after the enactment of the Federal Arbitration Act) that notwithstanding the arbitrators' duty to follow federal securities law, at the award-enforcement stage "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error" and held the pre-dispute arbitration agreement unenforceable for that reason, among others.[1] 346 U.S. at 436-37, 74 S.Ct. at 187.

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1. Federal securities statutes invalidate contractual provisions which prospectively waive the right to pursue statutory remedies for possible securities violations. Section 14 of the Securities Act of 1933

Justice Jackson wrote a brief concurring opinion simply to state that he

> [found] it unnecessary in this case, where there has not been and could not be any arbitration, to decide that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute. 346 U.S. at 438-39, 74 S.Ct. at 189.

Justices Frankfurter and Minton, in dissent, likewise disputed the majority's restrictive view of enforcement-stage judicial review in such a case:

> [Arbitrators are] "bound to decide in accordance with the provisions of section 12 (2)" [of the Securities Act of 1933]. On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," 201 F. 2d 439, 445, appropriate means for judicial scrutiny must be implied, however informal, whereby such compliance will appear, or want of it will upset the award. 346 U.S. at 440, 74 S.Ct. at 189.

The Second Circuit decision reversed in *Wilko* explicitly addressed the district court's concern (see 107 F. Supp. 75, 78 (S.D.N.Y. 1952)) that submission of such

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§14, 15 U.S.C. § 77n; Securities Exchange Act of 1934 § 29 (a), 15 U.S.C. § 78cc.

Although Arizona's securities statutes lack an explicit anti-waiver provision, under similar state statutory schemes an investor's pre-dispute waiver of blue sky law protections has been held invalid on public policy grounds. *Gilbert v. Mason*, 222 S.E. 2d 835, 837-38 (Ga. App. 1975).

disputes to arbitration would deprive investor-claimants of substantive benefits of federal securities law:

> It is urged that arbitration cannot give the same assurance as a trial in court that the arbitrators will apply the proper legal standards, including the provisions of section 12 (2) [of the Securities Act of 1933] as to the shift in the burden of proof and the legal measure of damages, and the requirement of section 14 that the exculpatory provision of the margin agreement [containing investor's purported waiver of securities law claims] be disregarded. The exculpatory provision ... is concededly invalid. Hence no question as to it will be submitted to the arbitrators. With respect to the legal measure of damages and the burden of proof provisions, while it may be true that arbitrators do not ordinarily consider themselves bound to decide strictly according to legal rules, there can be no doubt that they are so bound if the arbitration agreement so provides. Undoubtedly it is true in this country ... when parties have adopted arbitration, ordinarily "They must content themselves with looser approximations to the enforcement of their rights than those the law accords them, when they resort to its machinery." But ... the agreement in the case at bar is subject to the 1933 Act; consequently, the arbitrators are bound to decide in accordance with the provisions of section 12 (2). Failure to do so would, in our opinion, constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C.A. § 10. *Wilko v. Swan*, 201 F. 2D 439, 444-45 (2d Cir. 1953), reversed 346 U.S. 427, 74 S.CT. 182, 98 L.ED. 2D 168 (1953).

Today this Court's opinion in *Wilko* has itself been overruled. This development naturally lends fresh interest

to the dissenting and concurring opinions in *Wilko*, as well as the Circuit Court decision reversed therein. Moreover, the change implies that the Court either: (1.) retains the view that an arbitral award may not be vacated on grounds of erroneous interpretation of law, but is no longer troubled by the implication that the claimant will in such case have waived theoretically non-waivable substantive rights; or (2.) has come around to the more expansiveliberal theory of judicial review espoused in *Wilko* by the Second Circuit and the concurring and dissenting Justices.[2] A careful examination of the line of cases leading to the reversal of *Wilko* demonstrates that the latter alternative is correct.

The formerly prevailing view that a party asserting a tort claim arising out of a violation of federal statute could not be compelled to submit that claim to arbitration on the basis of a pre-dispute arbitration agreement was dealt its first serious blow in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87

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2. The Ninth Circuit asserted that substantive judicial review of securities arbitration awards is precluded by a "strong federal policy encouraging arbitration as a 'prompt, economical and adequate' method of dispute resolution," citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 481. That assertion was an exercise in question-begging. *Rodriguez de Quijas* certainly teaches the remedial adequacy of arbitration; but that this Court deems arbitration remedially adequate means either: (1.) that the Court would now disagree with both the *Wilko* majority and the *Wilko* minority, adhering to the majority's restrictive view of enforcement-stage review of awards made in such cases, but deeming the arbitral remedy adequate *despite* the possiblity that investors' statutory rights would be disregarded; or (2.) that the Court would now agree with the *Wilko* minority, deeming the arbitral remedy adequate *because* the arbitrators' failure to resolve the dispute in accordance with applicable securities statutes would render the award subject to vacation at the enforcement stage.

L. Ed. 2d 444 (1985). In that case, a foreign automobile manufacturer sought to compel arbitration of a dealer's Sherman Act and Clayton Act claims against it, pursuant to an arbitration clause contained in the dealership agreement. Notwithstanding that the Courts of Appeals had "uniformly" held that arbitration could not be compelled in such circumstances, the Court affirmed the district court's decree compelling arbitration of the antitrust claims. The Court rejected the argument that arbitration should not be compelled because the arbitrators might apply what would, in an American court, be considered an erroneous choice-of-law rule, and thus fail to apply American antitrust law. Such rejection, however, reflected a notion that such error, if committed, would be both reviewable and remediable:

> Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko v. Swan*, 346 U.S., at 433-434, 74 S. Ct., at 185-186.[FN 19] . . .
>
> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.[FN 20]

FN 19. ... We ... have no occasion to speculate on [the arbitral panel's application of the correct substantive law of restraint of trade] at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an aribtral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in the federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

FN 20. See n. 19, supra. We note, for example, that the rules of the Japan Commercial Arbitration Association provide for the taking of a "summary record" of each hearing, Rule 28.1; for the stenographic recording of the proceedings where the tribunal so orders or a party requests one, Rule 28.2; and for a statement of the reasons for the award unless the parties agree otherwise, Rule 36.1(4).

473 U.S. at 637-38, 105 S. Ct. at 3359-60.

Then, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 230, 107 S.Ct. 2332, 96 L.Ed. 2d 185 (1987), the Court refused to extend *Wilko* to preclude enforcement of pre-dispute arbitration clauses in the case of an investor's claim for damages under § 10 (b) of the Securities Exchange Act of 1934. However, the viability of *Wilko*'s restrictive concept of judicial review under 9 U.S.C. § 10, along with other aspects of the *Wilko* court's attitude toward arbitration, was openly questioned. Moreover, the

question whether, at the award-enforcement stage, judicial review might include inquiry to determine whether issues had been resolved in accordance with statutory law, was expressly said to have been reserved:

> *Wilko* noted that "the power to vacate an award is limited" and that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436-437, 74 S.Ct., at 187-88.
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> * * *
>
> [M]ost of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. . . . [W]e have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. *Mitsubishi* at 628, 105 S.Ct. at 3354. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. See id., at 636-637, and n. 19, 105 S.Ct., at 3359, and n. 19 (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of "effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court.")
>
> 482 U.S. at 231-32, 107 S.Ct. at 2340.

Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989), the Court expressly overruled *Wilko* in a brief opinion which quoted Justice Frankfurter's *Wilko* dissent with approval, 490 U.S. at 536, 109 S.Ct. at 1921, and which heavily stressed a procedural-substantive dichotomy which had been developing since *Mitsubishi*:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. 490 U.S. at 481, 109 S.Ct. at 1920.

II. SUBJECTING THE ARBITRAL AWARD TO REVIEW FOR ERROR IN THE APPLICATION OR INTERPRETATION OF SUBSTANTIVE SECURITIES LAW WOULD BE CONSISTENT WITH ESTABLISHED PRINCIPLES OF ARBITRATION LAW, AS WELL AS PUBLIC POLICY.

The Second Circuit and the minority Justices in *Wilko*, in asserting that where arbitrators are bound to follow the law their award is subject to review for legal error, were not contending for an innovation in the law of arbitration. Rather, they were reasserting an established rule of law which had almost sunk out of sight, swamped by a 20th-Century flood of commercial arbitration cases in which the arbitrators were *not* bound to follow the law.

In resorting to arbitration, disputants may (absent statutory restrictions), but need not, make the arbitrator their law-giver as well as their judge.[3] If the agreement to

3. Where parties agree to accept the result that seems fair and just to the arbitrator, even if the arbitrator is wholly ignorant of, or

arbitrate is silent, it is assumed they want the arbitral process to supply not only the decisional mechanism but also the substantive rules of decision. Arbitration under an agreement which explicitly binds the arbitrators to decide according to law has become a great rarity in modern practice, but it is well established that, in such a case, the award is subject to judicial review for legal error.[4]

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intentionally decides contrary to, the controlling substantive law, they have made the arbitrator their Congress and their Supreme Court:

> If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person, to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But if a distinct question of law . . . is referred . . . and the parties choose to say, they will not take the decision of the Court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree?
>
> . . . The question is, whether by the reference to arbitration they mean to make the arbitrator *pro hac vice* the Law-giver between them.
>
> *Young v. Walter*, 9 VES. JR. 365, 32 ENG. REP. 642, 643 (Ch. 1804) (opinion of Eldon, L. Ch.)

Of course, whatever the parties intend, they cannot prospectively empower an arbitrator to "give" them a securities law which differs from the Securities Act of 1933, the Securities Exchange Act of 1934 and/or applicable blue sky laws.

4. As is already suggested in the passage quoted supra, Note 3: "If [the arbitrator] means to decide according to law, and mistakes, the Court will set that right." *Young v. Walter*, 32 ENG. REP. at 643. There is a long line of authorities distinguishing between (1.) cases wherein the arbitrator is empowered to, and intends to, dispose of the matter in controversy as seems best to him, ***ex aequo et bono*** and according to his own lights, and (2.) those special cases in which the arbitrator is either constrained by the agreement of reference to decide according to the law or indicates in his award that he is attempting to decide according to the law. In the former circumstance (which obtains in the great majority of commercial arbitration cases), courts will not inquire into the legal correctness of the arbitrators' reasoning because

the inquiry would be irrelevant — such arbitrators "may fashion the law to fit the facts before them." *Berman v. Riverside Casino Corp.*, 354 F. 2D 42, 43 (2nd Cir. 1965) Or, to state the point somewhat more fully, an unrestricted submission

> is the commission of the arbitrator. By force of it he . . . may do what no other judge has a right to do; he may intentionally decide contrary to law, and still have his judgment stand. . . . [I]f arbitrators mean to decide according to law, but mistake the law in a material respect, and their mistake appears on the face of the award, or they admit it, the award will be set aside because it does not express their real judgment; but in cases where they do not intend to let the law govern their judgment, but to decide according to their own notions of what is just and right, the courts will not interfere, but allow their award to stand. *Leslie v. Leslie*, 24 A. 319, 320-31 (N.J. Ch. 1892) (citations omitted).

In the latter situation, however — where the arbitrators were bound to, or expressly attempted to, decide in accordance with a body of applicable substantive law — a court may deny enforcement of an award which is legally erroneous. *Kleine v. Catara*, 14 F. CAS. 7,869 p. 735 (D. Mass. 1814) (opinion of Story, Cir. Justice); *Boston Water Power Co. v. Gray*, 47 MASS. 131, 166 (1822); *Greenough v. Rolfe*, 4 N.H. 357, 359 (1828); *Estes v. Mansfield*, 88 MASS. 69 (1863); *Sanborn v. Murphy*, 50 N.H. 65, 67 (1870); *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 399-400 (1875); *Utah Constr. Co. v. Western Pacific R'y Co.*, 162 P. 631, 633 (Cal. 1917); Cf. *Evans v. Hudson Coal Co.*, 165 F. 2d 970, 974 (3rd Cir. 1948).

Most recent in this line of authorities is a 1969 California case which arose under a statutory scheme which contemplated that certain types of liability insurance disputes be resolved by contractual arbitration, but also required that the arbitrators decide such disputes on the basis of the parties' "legal entitlement" to recovery under applicable tort law. Since the award contained a brief statement of the arbitrator's reasons for the award the court was able to determine that the award was based upon a misunderstanding of California law regarding imputation of negligence.

The insurance company contended that an arbitrator's error of law is no basis for vacating or refusing to enforce his award, and cited many authorities ("unrestricted submission" cases arising out of contract disputes) which appeared to support that contention. However, the appellate court had no difficulty in distinguishing the arbitration under review from an arbitration in which the arbitrator had been under no

It is argued that a rule generally prohibiting such review would foster the speedy and economical resolution of the dispute, which was the parties' presumed objective in agreeing to arbitration. But this argument cannot be used to defend judicial enforcement of an award, rendered under a pre-dispute arbitration agreement, which reflects error in the application or interpretation of the substantive law governing non-waivable statutory rights. If, for example, an investor's effectual waiver of the right to have prospective securities-law claims resolved in accordance with governing securities statues would foster economy, speed, and finality, his outright waiver of prospective securities claims would be still cheaper, faster and more final.

While 9 U.S.C. § 10 (a) (4) "excess of authority" analysis is probably the most logical basis for judicial review of the correctness of the arbitrators' interpretation of the law in cases in which the arbitrators were bound to resolve the dispute in accordance with the law, there is also authority supporting use of "undue means" language identical to that found in 9 U.S.C. § 10 (a) (1) — the same provision relied upon by the district court in this case — for the same purpose. *Local Union 560 v. Eazor Express, Inc.*, 230 A. 2D 521, 525 (N.J. App. 1967); *Collingswood Hosiery Mills v. American Federation of Labor*, 107 A. 2D 43, 44 (N.J. App. 1954).

Both the Second Circuit decision reversed in *Wilko* and Justice Frankfurter's *Wilko* dissent reflect the view that 9 U.S.C. § 10 would authorize the district court to inquire into the arbitral tribunal's application and

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constraint to decide in conformity with the rules of law. The award was vacated because of the arbitrator's apparent legal error. *Allen v. Interinsurance Exchange of the Automobile Club of Southern California*, 80 CAL. RPTR. 247, 249-50 (App. 1969).

interpretation of substantive securities law, and to vacate the award if the dispute submitted to arbitration had not been resolved in accordance with controlling statutory law, but neither specifies the particular subsection of 9 U.S.C. § 10 which would be relied upon as the statutory basis for such review.

Ultimately, the attempt to identify particular authority in the words of § 10 is probably irrelevant. The Securities Act of 1933 and Securities Exchange Act of 1934 were specific, *later* enactments which not only prescribed substantive standards of conduct but voided contracts purporting to waive compliance with those standards. In working out the implications of this subsequent legislation for contractual arbitration arising out of alleged violation of those standards, and for judicial review of awards arising out of such arbitration, it is the Federal Arbitration Act of 1925 which must give way, to the extent of any conflict.

It must not be forgotten that the suppression of securities fraud and of the use of manipulative or deceptive practices in the sale of securities is a matter of strong public policy. In the Thirties Congress acted to reform common law rules such as *caveat emptor* as applied to the securities field, in pursuit of a strong public policy of ensuring fairness and integrity in the nation's capital markets. In the Sixties and Seventies, Congress acted to impinge upon even such principles as freedom of association and delectation of persons, in pursuit of a strong public policy of ensuring fairness and dignity for workers regardless of race or sex. Surely the policy goals which underlay the reform of securities law are no less "strong" today? Surely "strong public policy" is not a code phrase for the "public policy of the month"?

But if this be granted, how could one explain to Mr. and Mrs. McCollough that they can have no remedy, even though their arbitrators did *not* find that no securities fraud had been practiced upon them and did *not* find that they waived their securities-law claims with actual knowledge of them, while a discharged employee may not be reinstated — despite an award in his favor — unless his arbitrator *does* find that he has not engaged in sexual harassment? See *Stroehmann Bakeries v. Local 776*, 969 F. 2D 1436, 1441 (3rd Cir. 1992) and *Newsday v. Long Island Typographical Union*, 915 F. 2D 840, 843-44 (2nd Cir. 1990), both citing *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S.CT. 2177, 2183, 76 L.Ed. 2d 298 (1983). If the arbitrators in this case did give effect to the "note and release," then clearly the note and release is "a contract [which,] as interpreted by [the arbitrators] violates some explicit public policy" — viz., the policy against unknowing waiver of securities rights, as expounded in *Burgess v. Premier Corp.*, 727 F. 2D 826, 831 (9th Cir. 1984), *Childs v. RIC Group, Inc.*, 331 F. SUPP. 1078, 1083 (N.D. Ga. 1970), *Pearlstein v. Scudder & Germain*, 429 F. 2D 1136, 1142-43 (2nd Cir. 1970), *cert. denied* 401 U.S. 1013 (1971) and numerous other authorities. How, then, consistently with *W.R. Grace and Co. v. Local Union 759*, supra, can the federal courts enforce the award?

There is a fundamental difference between an arbitration in which the arbitrators are free to make up the substantive rules of decision, and one in which they are bound to resolve the dispute in accordance with applicable statutory law. Investors submit that a clear recognition of this difference, and of its specific implications for judicial review of awards rendered in securities cases submitted to arbitration under *Mitsubishi-McMahon-Rodriguez de*

Quijas, is necessary. There is no reason to believe that the arbitration of securities disputes could not survive as a valuable alternative to litigation if such awards were subject to similar scrutiny, at the enforcement stage, as is currently exercised with respect to labor arbitration awards. To subject securities arbitration awards to the same expectations with regard to reasoned support, and the same requirements vis-a-vis consistency with strong public policies, as are currently applied with respect to labor arbitration awards, would not "doom" or "throttle" securities arbitration.

III. SINCE "APPROPRIATE MEANS FOR JUDICIAL SCRUTINY MUST BE IMPLIED," WHERE AN AWARD IS NOT SUPPORTED BY A REASONED DECISION AND THE ARBITRAL RECORD STRONGLY SUGGESTS THAT THE AWARD WAS INFLUENCED BY LEGAL ERROR, THE DISTRICT COURT MUST BE FREE TO VACATE THE AWARD.

The traditional rule that an award may be vacated where arbitrators intended to follow, but misconstrued, applicable law has been noticed above. In considering cases in which that rule was invoked, the courts have long held that

> where the reasons of the award are not shown, there is no means of knowing whether or not the arbitrators intended to decide according to law. 6 C.J.S. *Arbitration* § 155 (1975).

It is for this reason that various institutions promoting the arbitral resolution of disputes actively discourage arbitrators from stating findings and conclusions or otherwise giving any reasons or explanations for their

awards — arbitrators are frankly advised that stating any reasons for their award may create a basis for a court challenge to the award.

In the context of a proceeding such as the one under review in this case, however, in which, despite the silence of the agreement, the arbitrators were bound to decide according to law (and especially where, as here, they were never explicitly instructed to do so), the implications of such "politic silence" are entirely different. Without a reasoned opinion, there is "no means of knowing whether or not the arbitrators intended to decide according to law," much less whether they did so.

Although it is the general rule that arbitrators need not explain their decision,

> [n]onetheless, the extent of an arbitrator's obligation to explain the award is necessarily related to the scope of judicial review of it. *Sobel v. Hertz, Warner & Co.*, 469 F. 2D 1211, 1214 (2nd Cir. 1972).

This principle has not yet been explicitly applied in the newly-opened field of securities arbitration under *Mitsubishi-McMahon-Rodriguez de Quijas*.[5]

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5. In *Mitsubishi* the prospect of substantive review of arbitral proceedings at the award-enforcement stage was very obliquely addressed, and then only in the context of a basic choice-of-law determination in an international commercial arbitration. Nonetheless, the Court pointed to the arbitral tribunal's rule requiring a reasoned decision as one of the factors ensuring that effective judicial review would be possible. 473 U.S. at 638, 105 S.CT. at 3360, n. 20.

Perhaps the nearest analog to the enforcement/vacatur proceeding arising out of a *Mitsubishi-McMahon-Rodriguez de Quijas* securities arbitration is the Administrative Procedures Act review case. In each instance, an expert panel utilizing relatively informal procedures and entitled to draw upon its own specialized knowledge has rendered a determination on a particular matter in controversy, and the reviewing

IV. BROKER'S EXTENSIVE RELIANCE ON ITS INVALID "NOTE AND RELEASE" DEFENSE JUSTIFIES THE DISTRICT COURT'S REFUSAL TO ENFORCE THE ARBITRATION AWARD.

In the entire history of this case, no authority has ever been cited which supports the proposition that, *where the arbitrators were bound to decide in accordance with the law*, their award is entitled to judicial enforcement even if it is legally erroneous. Nevertheless, this proposition has clearly been adopted by the Court of Appeals. Therefore, the Court of Appeals never considered in what manner such error must be shown.

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court, while giving due deference to the quasi-judicial panel's findings of fact and its expertise, must determine whether the panel has resolved the disputed matter in accordance with controlling substantive law. In the APA context, as a corollary to the court's duty to review the agency determination for correct interpretation of applicable law, the agency's ruling must include adequate explanation to enable the court to ascertain the legal reasoning supporting the agency decision. *Int'l Longshoremen's Ass'n v. National Mediation Board*, 870 F. 2D 733, 735 (D.C. Cir. 1989). "Where an agency undertakes administrative action without stating reasons therefor, a court may set aside such action." *Bacon v. Dep't of Housing and Urban Development*, 757 F. 2D 265, 269 (9th Cir. 1985) (dictum).

Similarly, reasoned decisions are the norm in the field of labor arbitration. Because a labor arbitrator's interpretation of the collective bargaining agreement is open to a degree of substantive review at the judicial enforcement stage, it has been recognized that labor contract arbitral tribunals "have a duty to ... give reasons clearly, if briefly, justifying their decisions." Harvill v. Roadway Express, Inc., 640 F. 2d 167, 169-70 (8th Cir., 1981).i.Cases:Harvill v. Roadway Express, Inc., 640 F. 2d 167 (8th Cir., 1981);; Vulcan-Hart Corp. v. Stove, Furnace & Allied App. Workers, 516 F. Supp. 394, 395 (E.D. Mo. 1981), affirmed 617 F. 2d 1182 (8th Cir. 1982).i.Cases:Vulcan-Hart Corp. v. Stove, Furnace & Allied App. Workers, 516 F. Supp. 394 (E.D. Mo. 1981), affirmed 617 F. 2d 1182 (8th Cir. 1982);.

In the district court, Investors sought vacatur of the arbitral award on "undue means" grounds, citing four illegal arguments urged upon the panel by Broker's counsel. Specifically, Investors claimed that Broker had misrepresented the law to the arbitrators when it argued: (1.) that contributory negligence would be a defense to Appellee's claims under Arizona securities law; (2.) that under Arizona securities law Broker would have a "good faith" defense to the claims based upon alleged misconduct of Investors' account representative, Broker's employee; (3.) that Investors could have no private right of action under the Arizona Consumer Fraud Act if the alleged misconduct was also violative of Arizona securities statutes; and (4.) that even if Broker had been liable to pay damages to Investors under state or federal securities statutes or otherwise, the "note and release" which Broker procured from Investors was a binding and effectual waiver of any such claim.

The district court found that two of these arguments (to wit, nos. (1) and (3)), asserted in Broker's formal written Answer filed in the arbitration proceeding, were so clearly inconsistent with applicable law that Broker knew or should have known that they were groundless. "Raising multiple facially meritless defenses," the district court concluded, "constitutes procurement of an award by 'undue means' within the meaning of 9 U.S.C. § 10 (a)."[6]

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6. Broker's conduct in this case was especially "undue." First, by asserting defenses which they knew or should have known to be invalid, Broker's counsel breached their duty of candor toward the arbitral tribunal. Rules of the Arizona Supreme Court, R. 42, ER 3.3 (1), provides that an attorney "shall not knowingly make a false statement of law to a tribunal." Second, the impact of Broker's misstatements of Arizona securities law was aggravated by Broker's vigorous and successful objection to Investors' offer of Mr. Matthew Zale, former

On appeal, while maintaining that this conclusion is correct as far as it goes, Investors contended that the district court's review of the award for error in the application or interpretation of securities law: (1.) was not limited to Broker's "facially groundless" defenses; and (2.) was not limited to defenses which Broker "knew or should have known" to be illegal. Since it is clear that legally invalid defenses were invoked by Broker, and since no reasons were given for the arbitrators' decision, whether the award was influenced by Broker's illegal arguments is a question of fact. The record before the district court was more than adequate to support its concern that the award probably reflected, at least in part, the erroneous contentions urged by Broker. Broker never attempted to show that the district court's factual inference was "clearly erroneous."

In its appellate brief, Broker itself confirmed the critical impact of at least one of Broker's misrepresentations of securities law:

> The real issue was the enforceability of the note and release and the viability of the Investors' factual allegations. The panel rejected the Investors' position but adopted A.G. Edwards' position that the note and release were valid. Respondent's Ninth Circuit Opening Brief, p. 22.

At the arbitration hearing, Broker's contention regarding the note was clear and simple: the note which Broker had Investors sign, promising payment of the negative account balance which resulted from their "Black Monday" loss, contained a boilerplate "release of claims," this release language constituted an effectual waiver of Investors'

Director of the Securities Division of the Arizona Corporation Commission, as an expert witness on Arizona securities law.

statutory claims, and because the note was executed after the transactions Investors complain of had been completed, statutory and other restrictions on prospective waiver of such claims are ineffectual to invalidate this waiver. In final arguments at the close of the arbitration hearing, Broker's counsel heavily stressed the purportedly dispositive effect of the release language contained in the note.

The problem with this argument is that waiver is a voluntary and intentional relinquishment of a *known* right, and in the context of alleged violation of securities statutes this has been held to require actual knowledge of the existence of the statutory claim purportedly waived:

> A release is valid for purposes of federal securities claims only if the [plaintiffs] had "actual knowledge" that the claim existed. *Burgess v. Premier Corp.*, 727 F. 2D 826, 831 (9th Cir. 1984).

> [T]o support a finding of waiver [of private civil remedy for alleged violations of Securities Exchange Act of 1934], it must be found that the particular statutory right was actually known. *Childs v. RIC Group, Inc.*, 331 F. SUPP. 1078, 1083 (N.D. Ga. 1970).

> [A]s to general releases obtained prior to the initiation of litigation, there is no informed release if the prospective plaintiff is unaware of the violations of federal securities law and/or that he is releasing claims under the federal securities law. 3A H.S. Bloomenthal, SECURITIES AND FEDERAL CORPORATE LAW, § 8.30 [1] (1991 Rev.).

Cf. *Pearlstein v. Scudder & Germain*, 429 F. 2D 1136, 1142-43 (2nd Cir. 1970), *cert. denied* 401 U.S. 1013 (1971). This point was clearly raised by Investors in response to Broker's "note and release" defense.[7]

Broker never attempted to prove, or even to argue, that Investors had knowledge of a securities violation, or any idea of their rights under the securities statutes, at the time Broker induced them to sign the "note and release." Broker simply asserted repeatedly that the release was valid because it was executed after the allegedly improper transactions had been completed and (obviously) after Investors learned of their loss. Broker never tried to reconcile this defense with case law under the securities statutes.

The note and release defense may not have been "facially invalid" in the sense that it could not have

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7. As Investors also pointed out, Broker's affirmative defense based on the "note and release" would have been invalid as a matter of applicable securities law even disregarding the § 29 (a) anti-waiver provision. Under § 29 (b) of the Securities Exchange Act of 1934:

> Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract . . . the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void . . . . 15 U.S.C. § 78cc (b).

Assuming, as an affirmative defense must assume, that the debit balance of Investors' account and Investors' consequent debtor relationship to Broker was the result of Broker's conduct in violation of securities law, the note prepared to evidence that indebtedness (and the "release" contained therein) would have been void under this statute. Cf. ***Regional Properties, Inc. v. Financial and Real Estate Consulting Co.***, 678 F. 2d 552, 558-60 (5th Cir. 1982); ***Pearlstein v. Scudder & Germain, 429 F. 2d 1136 (2d Cir. 1970), cert. denied 401 U.S. 1013 (1971).***

constituted a defense to Investors' claims under any set of facts, but it clearly was invalid in light of the total absence of proof that Investors actually knew of and intended to release statutory securities claims. Since it was heavily stressed by Broker from the beginning to the end of the arbitral proceeding, and since even Broker affirms the crucial importance of this contention in bringing about the arbitral result, it would certainly take a leap of faith to conclude that the arbitrators' unexplained, one-sentence award was not at least in some part based upon this invalid defense.

There can be no question that, if the arbitration hearing had been a jury trial, the submission of the note and release defense to the jury over Investors' objection would have constituted reversible error, in the event of a general verdict in Broker's favor. It is interesting to note that *Wilko* also involved broker-dealer's potential waiver defense, based on boilerplate provisions of the brokerage contract. There, however, by resisting arbitration the investors procured broker-dealer's concession of the invalidity of this defense, leading the Court of Appeals to remark: "The exculpatory provision [of the brokerage contract] is concededly invalid. Hence no question as to it will be submitted to the arbitrators." 201 F. 2D at 444.

Now this Court has aligned itself with the Second Circuit's approach to *Wilko*, and in this case Broker, which was compelled to make no concessions before entering the arbitration room, not only invoked but emphasized its waiver defense based upon the note and release — even though it now makes no attempt to reconcile that defense with applicable securities law. If, under a rule permitting enforcement of a pre-dispute agreement to arbitrate statutory tort claims, appropriate means for judicial scrutiny must be implied, whereby resolution of the

dispute in accordance with controlling statutory law will appear, or want of it will upset the award, then surely such "appropriate means" must include an intelligent inference that the award was probably influenced by a legally invalid defense which was strongly urged upon the arbitrators by attorneys representing a national securities dealer.

Otherwise, a brokerage contract provision which reads:

> The parties agree that any claim arising out af any alleged violation of any state or federal securities statute shall be submitted to arbitration.

would, in order to provide full disclosure to the lay investor, have to be rewritten as:

> The parties agree that any claim arising out af any alleged violation of any state or federal securities statute shall be submitted to arbitration. The arbitrator may disregard state and federal securities statutes in resolving such claim. By agreeing to this provision, Investor may be waiving substantive rights which he could not waive in any other manner.

RESPECTFULLY SUBMITTED this 26 day of October, 1991.

BEGAM LEWIS MARKS WOLFE & DASSE

By: _____
Frank Lewis

BRIAN K. STANLEY

_____

Attorneys for Petitioners McCollough

APPENDIX

Pursuant to Supreme Court Rule 14 (k)

(967 F. 2D 1401)

A.G. EDWARDS & SONS, INC.,
a Delaware corporation, Plaintiff-Appellant,
v.
William F. McCOLLOUGH and Jeanene
MCCOLLOUGH, husband and wife,
Defendants-Appellees.

No. 91-15839.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 9, 1992.
Decided June 26, 1992.

Brokerage firm applied for order confirming arbitration award in securities matter, and investors moved to vacate award or for alternative relief. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., 764 F.Supp. 1365, denied the application and vacated the award and remanded the matter for a new hearing. Firm appealed. The Court of Appeals held that investors were not entitled to vacation of the award on ground that award was secured through undue means because two of defenses put forth by firm were sufficiently meritless to constitute undue means.

Reversed.

Charles W. Herf, Quarles & Brady & Fannin, Phoenix, Ariz., for plaintiff-appellant.

Brian K. Stanley, and Frank Lewis, Langerman, Begam, Lewis & Marks, Phoenix, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before: BROWNING, PREGERSON, and RYMER, Circuit Judges.

PER CURIAM:

A.G. Edwards & Sons appeals the district court's order vacating an arbitration award against the McColloughs. We reverse and remand.

I

The McColloughs, investors, agreed to arbitration in lieu of a federal court suit to resolve a dispute with their brokers, Edwards & Sons, as to the cause of a considerable loss in their account. The McColloughs then filed with the New York Stock Exchange Director of Arbitration, their complaint alleging in conclusory fashion violation of federal and Arizona RICO, securities, and Consumer Protection statutes. Edwards & Sons answered, raising fourteen affirmative defenses, two of which the district court below found facially meritless. The McColloughs responded by filing a brief which sought to rebut these defenses, and specifically argued that the two defenses in question were without merit. At the close of arbitration, the panel found in favor of Edwards & Sons and awarded the firm $310,850.12. The panel did not state the reasons for its award.

The brokers filed an Application to Confirm Arbitrator's Award in federal court in Arizona. In response, the McColloughs moved to vacate the award or to remand for a statement of reasons.

The district court rejected the McColloughs' argument that the arbitrators were guilty of misconduct in refusing to hear material evidence. It also rejected their argument that the award was procured through fraud because Edwards & Sons made knowing misstatements of the law by raising the meritless defenses. The court noted that federal courts must be slow to vacate an arbitral award on the grounds of fraud and that fraud is only a

viable ground for vacatur when it is undiscoverable during the proceeding. The Court held the McColloughs failed to make out fraud because all the alleged misstatements had been pointed out to the arbitrators. The court also rejected the McColloughs' motion to remand for a statement of reasons, finding it well settled that arbitrators are not required to state their reasons.

The court did, however, accept the McColloughs' third argument for vacatur — that the award was procured through "undue means" within the meaning of 9 U.S.C. § 10(a)(1). The McColloughs argued that two of the defenses put forth by Edwards & Sons were so facially meritless that to offer them was to engage in "undue means." The court agreed, finding that such behavior constituted grounds for vacatur. The court then remanded the case to a different arbitration panel.

II

As the district court noted, federal court review of arbitration awards is extremely limited. "It is generally held that an arbitration award will not be set aside unless it evidences a 'manifest disregard for law.' " Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir.1991) (citing "Steelworkers Trilogy"). The courts should not reverse even in the face of erroneous interpretations of the law. Id.

The district court did not state whether (1) in the face of a lack of findings, it would presume the arbitrators had been persuaded by the meritless defenses; or (2) the mere act of putting forth the arguments, whether they were relied upon or not, constituted "undue means." In either case, the court's decision is in conflict with the law of this circuit.

If the district court employed a presumption that the meritless defenses had an impact on the arbitrator's decision, its holding is in obvious tension with the applicable case law. As the district court recognized, arbitrators are not required to state the reasons for their decisions. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); Kaiser Cement Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1102 n. 6 (9th Cir.1986). The rule that arbitrators need not state their reasons presumes the arbitrators took a permissible route to the award where one exists. See Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C.Cir.1989). Under the district court's rationale in this case, courts would be free to vacate an award in any case in which the winning side had raised even one meritless defense and the arbitrators had not specifically identified the reasons for their award. Panels of arbitrators wishing to avoid relitigation would be forced to state the reasons for their decisions in direct contradiction of the universally accepted rule that a statement of reasons is not required and arbitrators are presumed to have relied on permissible grounds. See United Steelworkers, 363 U.S. at 598, 80 S.Ct. at 1361.

If the district court meant to hold that no reliance by the arbitrators on the meritless arguments need be demonstrated because the mere offering of the defenses itself constitutes "undue means," its holding conflicts with the language of s 10 and cases interpreting it. The statute allows for vacation of an award "procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Thus the statute requires a showing that the undue means caused the award to be given. Cf. Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir.1990) (the

statutory language requires a nexus between the alleged fraud and the basis for the panel's decision).

Nor do we agree with the district court that mere sloppy or overzealous lawyering constitutes "undue means."[1] Although the term has not been defined in any federal case of which we are aware, it clearly connotes behavior that is immoral if not illegal. See Black's Law Dictionary 1697 (Rev. 4th ed. 1968) ("Undue" means "more than necessary; not proper; illegal," and "denotes something wrong, according to the standard of morals which the law enforces." "Undue influence" means any "improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered."). Offering a meritless defense, however unfortunate, is part and parcel of the business of litigation; it carries no connotation of wrongfulness or immorality. In addition, it occurs with such frequency that, were the district court's rule to be adopted, the federal courts would be required to overturn arbitration awards regularly as procured by "undue means." This would be inconsistent with the extremely limited scope of judicial review of such awards.[2]

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1. The McColloughs now argue that the district court should have relied on the "excess of authority" provision of 9 U.S.C. § 10(a)(4) to support its holding. We agree with the D.C. Circuit that, in the absence of any evidence that the arbitrators "exceeded their powers," the failure to provide reasons does not justify overturning an award under this section.

See Sargent, 882 F.2d at 532.

2. Appellee's various policy arguments urging tighter judicial review of arbitration awards are not persuasive. Such a course would undermine the strong federal policy encouraging arbitration as a "prompt, economical and adequate" method of dispute resolution for those who agree to it. See Rodriguez de Quijas v. Shearson/American

Moreover, the McColloughs have not satisfied the first part of this court's three part test for vacating an arbitration award under 9 U.S.C. § 10(a). We have held that, in order to justify vacating an award because of fraud, the party seeking vacation must show that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir.1986) (citing Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir.), cert. denied, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982)). We see no reason not to apply this test to cases raising claims of "undue influence."

An obvious corollary to the first prong of the test stated above is that, where the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple. This rule is consistent with "the extremely narrow scope of our review of the arbitration panel's decision." Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1485 (9th Cir.1991).

In this case, the alleged "undue means" — the assertion of facially meritless defenses — were known to the McColloughs and the arbitrators from the outset of the arbitration. In fact, as mentioned above, in discussing and rejecting the McColloughs' fraud argument, the district court concluded that "all the alleged 'misstatements' (of the law) were known to, and pointed

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Express, Inc., 490 U.S. 477, 479-80, 481, 109 S.Ct. 1917, 1919-20, 1920, 104 L.Ed.2d 526 (1989).

out to the arbitrators by, (the McColloughs') counsel," and thus that the requirement that the fraud must not have been discoverable upon the exercise of due diligence was not satisfied. A.G. Edwards & Sons v. McCullough, 764 F.Supp. 1365, 1370 (D.Ariz.1991).

The decision vacating the arbitration award is REVERSED. The district court shall enter an order confirming the arbitration award. The appellant is entitled to attorneys' fees in accordance with the agreements between the parties.

(764 F. SUPP. 1365)

A.G. EDWARDS & SONS, INC., a Delaware corporation, Plaintiff,
v.
William F. McCULLOUGH and Jeanene McCullough, husband and wife, Defendants.

Misc. No. M90-129-PHX-PGR.
United States District Court,
D. Arizona.
April 30, 1991.

Brokerage firm applied for order confirming arbitration award in securities matter, and investors moved to vacate award or for alternative relief. The District Court, Rosenblatt, J., held that: (1) arbitrators did not have to hear testimony of investors' legal expert and had discretion on how to receive proof of "foreign law"; (2) investors were not entitled to vacatur of award on basis of fraud; (3) brokerage firm's conduct in raising multiple facially meritless defenses constituted procurement of award by "undue means"; and (4) case would not be remanded to panel for statement of their reasons for award.

Plaintiffs' application denied, defendants' motion granted, and matter remanded for new hearing.

Charles W. Herf, Phoenix, Ariz., for plaintiff.

Frank Lewis, Phoenix, Ariz., for defendants.

MEMORANDUM AND ORDER

ROSENBLATT, District Judge.

Before the Court is Plaintiff's application for an order confirming an arbitration award and Defendants' motion to vacate the arbitration award or for alternative relief.

After reviewing the moving papers, the record, and the applicable law, and after hearing oral argument, the court finds it appropriate to deny Plaintiff's application and to grant Defendants' motion to vacate the arbitrators' award.

I. FACTS

Defendants, a couple in their 60's, asserted claims against Plaintiff, their stockbroker's employer, complaining that trading high risk "naked options" for their account was not in accordance with Defendants' stated investment objective of "safety of principal." The stock market "crash" of 1987 resulted in Defendants losing the equity position in their account of approximately $750,000 and incurring a liability (a "debit" balance) to Plaintiff for approximately another $250,000, for a total loss of approximately $1,000,000.

Plaintiff's in-house counsel (David Minnick) secured a promissory note from Defendants for the $250,000 "debit" balance in the account. The note contained a clause releasing any and all claims against Plaintiff. Minnick did not inform Defendants that they might have a claim against Plaintiff. Defendants made at least two payments. Subsequently, Defendants retained counsel and made a Statement of Claim to the New York Stock Exchange on October 14, 1988. The parties participated in arbitration pursuant to the arbitration clause in their contract. That proceeding resulted in an award whereby Defendants took nothing and their liability to Plaintiff was upheld.

Defendants' claims were based on violations of federal and state securities and RICO laws, and state consumer fraud laws. (Id.). The arbitrators gave no reasons for their decision.

II. DISCUSSION

A. Standard of Review

A. Standard of Review

(1) Federal court review of arbitration awards is limited and courts are permitted to make only a "restricted review" of arbitral decisions. E.g., Rostad & Rostad Corp. v. Investment Management & Research, Inc., 923 F.2d 694 (9th Cir.1991) (citation omitted); Northrop Corp. v. Triad Int'l Mktg., S.A., 811 F.2d 1265, 1269 (9th Cir.), cert. denied, 484 U.S. 914, 108 S.Ct. 261, 98 L.Ed.2d 219 (1987); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902 (9th Cir.1986).

B. Grounds for Vacatur

(2) The bases for vacating an arbitration award are limited to (1) those provided in 9 U.S.C. § 10(a)-(d); and (2) perhaps the judicially created "manifest disregard of the law" doctrine. See Rostad, 923 F.2d at 697. (observing that there is "some doubt" whether manifest disregard of the law remains a viable basis for vacating an award after Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526 (1989)); Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir.1990). Defendants offer two statutory bases for vacating the award:

Where the arbitrators were guilty of misconduct in refusing to . . . hear evidence pertinent and material to the controversy.

9 U.S.C. § 10(c); and

Where the award was procured by corruption, fraud, or undue means.

Id. § 10(a).

1. 9 U.S.C. § 10(c)

Defendants' Motion to Vacate asserts that the arbitrators refused to hear the testimony of their expert on

the applicable Arizona law. Defendants point to four (4) "misstatements" of law offered by Plaintiff's counsel, and cite authority for the position advanced by Defendants as evidence of the "misstatements." Defendants then argue that "if the arbitrators accepted as correct any one of the four misstatements ... they would have incorrectly believed that they had to find against (Defendants) even if (Defendants) had proved their case of securities fraud." Defendants complain that because the arbitrators gave no reasons for their decision they cannot determine whether they did, in fact, accept any of the "misstatements" as correct.

Plaintiff responds by arguing that the arbitrators requested, and received, legal briefs on the applicable law from both parties, and that Defendants presented their legal theories in argument before the panel. Plaintiff also asserts that the panels' refusal to hear the expert was a correct evidentiary ruling, citing cases holding that legal experts may not testify as to meaning and applicability of securities laws. Until oral argument, Plaintiff did not address the "misstatements" except to state it would not "waste( )" the court's time with arguing "which party advanced the appropriate legal theories."

a. Arbitrators' Discretion in Receiving Evidence

(3)(4) Vacatur of an award for refusing to hear evidence is rare. Ouziel v. Shearson Lehman Bros., Inc., No. CV 86-1822 (RJD) (E.D.N.Y. April 11, 1988) (1988 WL 36933, *2, 1988 U.S. Dist. LEXIS 3037, *4) (citing Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir.1985) (arbitrator not bound to hear all evidence tendered, but must allow "adequate opportunity" to present evidence and arguments)). The arbitrator is the

judge of admissibility and relevancy of evidence. Hoteles Condado, 763 F.2d at 39 (citation omitted). While the arbitrators might err in determining relevance, every failure to receive evidence does not require vacation of an award. Fairchild & Co. v. Richmond, F. & P.R.R., 516 F.Supp. 1305, 1314 (D.D.C.1981).

The error which would constitute misconduct so as to justify vacating an award must not simply be an error of law, but one which so affects the rights of a party that it may be said to deprive him of a fair hearing.

Id. (emphasis added) (citation omitted).

Fairchild was a contract dispute which involved, in part, an objection that the arbitrators had not permitted testimony by a lay witness about his "legal opinions." Id. The court found that the arbitrators did not err by restricting inquiry into the witness' legal opinions because it "could be viewed as unnecessary and a matter best left to the arguments of counsel." Id.

While Fairchild did not involve testimony by an "expert" on legal issues, it is sufficiently analogous to the instant action to suggest that the arbitrators were not required to hear the Defendants' legal expert. Plaintiff cites cases holding that expert testimony must not amount to a legal conclusion, and argue that the arbitrators made a correct evidentiary ruling. These cases, while perhaps informative, are inapposite because arbitrators are not required to follow legal rules of evidence. E.g., Quziel, 1988 WL 36933, at *2, 1988 U.S. Dist. LEXIS 3037 at *4 (citation omitted) (evidence of settlement offer, while inadmissible in court, was admissible in arbitration where rules of evidence are inapplicable); Fairchild, 516 F.Supp. at 1315 (rules of evidence not binding in arbitration) (citation omitted).

In Hoteles Condado, cited by Defendants in support of vacatur, the First Circuit affirmed a district court's vacatur of an award where the arbitrator "effectively denied the Company an opportunity to present any evidence in the arbitration proceeding." 763 F.2d at 40 (emphasis added). Here, Defendants were not denied an opportunity to present any evidence, assuming that the briefs are considered "evidence" of the law. The facts here are not so compelling as Hoteles Condado, and it is thus not persuasive.

Defendants' Reply Memorandum characterizes the excluded testimony as one of "fact" and not law by analogizing choice-of-law principles. Defendants argue that because there is no judge in an arbitration to declare the "law of the forum," all law is "foreign" and is to be proved as a "fact" as in any judicial proceeding involving foreign law. Defendants assert that the refusal of the arbitrators to hear their expert deprived them of the opportunity to prove the "fact" of the "law." Defendants' argument does not appear to be well supported, indeed, they cite no authority other than American Jurisprudence. A compact discussion of this issue is contained in a Washington case:

The admission and consideration of foreign law should be subject to the control of the trial judge, free to consider in his discretion any source or material which he deems relevant to the determination of the issue.... The determination of foreign law is not to be made by the jury.... When the evidence is in, the foreign law that has been proved as a fact assumes a new role and becomes law.

Byrne v. Cooper, 11 Wash.App. 549, 523 P.2d 1216 (1974). The Byrne court explained that while foreign law

is proved as a "fact," it is not a true fact except in the procedural manner of its proof. Ultimately "foreign" law is an issue of law. Id.

Defendants' semantic argument that they were prevented from proving the "fact" of the "law" is not persuasive because a court (and presumably an arbitration panel) has discretion to determine what source or material is relevant to determining "foreign" law. See id. See generally E. Scoles & P. Hay, Conflict of Laws 403-14 (1982). Arbitrators are not bound by a court's rules of procedure just as they are not bound by rules of evidence. E.g., Forsythe, 915 F.2d at 1022 (citing Wilko v. Swan, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953), overruled on other grounds, Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989)). Parties, absent agreement, cannot impose rigorous procedural standards in a proceeding that is designed to avoid such formalities. Id.; Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 744 (9th Cir.1985) (procedural matters "become part of the bundle of issues committed to decisions by the arbitrator"). Therefore, the arbitrators' had discretion to decide how to receive proof of the "foreign" law. Choosing to rely on briefs and the arguments of counsel does not appear to be an abuse of that discretion, even if a district court could apply such a standard of review to arbitration awards.

b. The "Fair Hearing" Requirement

(7) Because the arbitrators' decision not to hear Defendants' expert was within their discretion, to prevail on this argument Defendants must demonstrate that they were deprived of a fair hearing. Hoteles Condado, 763 F.2d at 40; Fairchild, 516 F.Supp. at 1314. Defendants

have not so shown. Defendants supplied a legal memorandum to the arbitrators. Defendants' counsel advanced his view of the applicable law at the hearing. Arbitrator Marsh (the practicing Arizona attorney that voted for Defendants) stated "I also feel that (Defendants' expert) is not the ultimate authority as to what the law is." Arbitrator Marsh asked Defendants' counsel for citations to specific statutes and cases that Defendants wanted the panel to consider. Defendants' counsel acknowledged that the arbitrators, if they heard the expert, were "free to accept or reject" the testimony. Arbitrator Lehing (the non-practicing attorney that voted against Defendants) stated that the panel was "perfectly capable of reading the statutes and the case law." The third arbitrator (a non-attorney) apparently made no comments on the issue. Thus, from the record it appears that the two lawyers on the panel decided not to hear the testimony of Defendants' expert. The panel requested briefs from counsel to address "all of those issues."

Defendants' twenty-five page legal memorandum is undated; however, at page 19, first paragraph, the memorandum implies that it was prepared before the conclusion of the hearing. It is not clear if Defendants provided citations to specific statutes and cases, at the conclusion of the hearing, as requested by Arbitrator Marsh. Defendants may have voluntarily foregone this opportunity to present their legal position in the form requested by the panel (written briefs at hearing conclusion), and now should be held to have waived the right to object to the arbitrators' refusal to hear the evidence in the form Defendants desired (expert testimony).

In sum, it appears that the Defendants had an adequate opportunity to present their legal theories to the

panel. It does not appear that Defendants were "deprived of a fair hearing" by the refusal of the arbitrators to hear Defendant's expert.

However, the court is troubled by certain facially meritless defenses raised by Plaintiff at the arbitration proceeding. While the Court concludes that the arbitration panel was not required to hear Defendants' expert to provide a "fair" hearing, the parties are not free to raise obviously improper or frivolous claims or defenses.

2. 9 U.S.C. § 10(a)

Defendants' Reply Memorandum raises "fraud" and "undue means" as additional bases for vacating the award. Defendants raise "knowing misrepresentation to the tribunal of the applicable law" as the "fraud" element; and assert that if the "misstatements" were unknowingly made they constitute "undue means." Defendants raise this after noting that Plaintiff did not respond to the allegations of misstatements of law, except to attach a copy of the two memorandums submitted to the arbitrators. Defendants suggest it is appropriate to consider the Plaintiff to have admitted the "misstatements." (Id.). After hearing oral argument on the issue, the Court agrees that Plaintiff has admitted at least two of the four alleged "misstatements."

a. Vacatur on Ground of Fraud

(8)(9) "(C)ourts must be slow to vacate an arbitral award on the ground of fraud." Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir.), cert. denied, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982). Courts require a nexus between the alleged fraud and the panels' decision. E.g., Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir.1990) (and cases cited therein). Where the panel hears the allegation of fraud, then

decides the controversy on clearly independent grounds, the award should not be vacated. Id. The Eleventh Circuit has recently held that to prevail on a motion to vacate an award based on fraud, the movant must meet three requirements:

1. Establish fraud by clear and convincing evidence;

2. The fraud must not have been discoverable upon the exercise of due diligence prior to or during the hearing; and

3. The fraud is materially related to an issue in the arbitration.

O.R. Secs., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742, 748 (11th Cir.1988) (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir.1988)); accord Dogherra, 679 F.2d at 1297.

In the instant case, all the alleged "misstatements" were known to, and pointed out to the arbitrators by, Defendants' counsel. Based on the record, it appears that Defendants' cannot meet the second Bonar element, and therefore are not entitled to vacatur on the basis of fraud.

b. Mere Error of Law is not Ground for Vacatur

It appears that counsel for both parties presented their legal arguments in the usual adversarial way, both orally and through legal memoranda. Plaintiff submitted two briefs and Defendants at least one brief. Defendants' complaint might be construed simply as a difference of opinion on the law; that is, Defendants believe they should have won on the law. An arbitration award will be upheld even when the arbitrators' view of the law is "open to serious question." Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir.1982); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir.1986). "(M)ere error in interpretation of

... law (will) not justify refusal to enforce the arbitrators' decision." Northrop, 811 F.2d 1265 (9th Cir.1987); cf. Rostad, 923 F.2d at 697 (9th Cir.) (rejecting, as self-serving and without merit, claim that the arbitrators "exhibited evident partiality" because, in complaining party's opinion, the arbitrators were wrong on the law). In the instant case, there is more than a possibility of "mere error" in interpreting the law, there is the element of facially meritless defenses raised by Plaintiff.

c. Vacatur on Ground of Undue Means

(1). Contributory Negligence

Plaintiff asserts in its Answer:

(T)he claimants caused or contributed to cause the alleged damages of which the Claimants complain herein and are thus barred by their contributory negligence from recovering such alleged damages from (Plaintiff). To the extent that the doctrine of comparative negligence is applicable (Defendants' claim is barred). (Plaintiffs' Answer P 22) (emphasis added).

Plaintiff does not address this defense in either of the two legal memorandums submitted to the panel. At oral argument Plaintiff's counsel urged that contributory negligence was pled as a defense only "to the extent it applies." The text cited above indicates otherwise. Only comparative negligence was pled "to the extent it applies."

Defendants cite Washington Nat'l Corp. v. Thomas, 117 Ariz. 95, 570 P.2d 1268 (Ct.App.1977) for the proposition that contributory negligence is not a defense to a statutory state securities fraud claim. Thomas so holds. Id. at 102, 570 P.2d at 1275. It is clear to the Court that contributory negligence is no defense to Defendants' state law claim.

(2). Consumer Fraud Statute is Inapplicable

Plaintiff, in its Answer, states:
(Plaintiff) asserts that the Arizona Consumer Fraud Statute (Section 44-521 et seq A.R.S.) is inapplicable to claims arising from the purchase and sales of securities.... and (Plaintiff) is therefore in no event liable (for damages). (Plaintiff's Answer P 29) (emphasis added).

Plaintiff's legal memorandum does not state that the statute is inapplicable to securities fraud as in its Answer; rather it states that the requisite elements for a private cause of action (false promise or misrepresentation made in connection with the sale or advertisement of merchandise, and the hearer's reliance and consequent and proximate injury) cannot be proved by Defendants. Plaintiff cites Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 666 P.2d 83, 87 (Ct.App.1983) and Parks v. Macro Dynamics, Inc., 121 Ariz. 517, 591 P.2d 1005, 1008 (Ct.App.1979). Dunlap did not mention reliance as an element. Parks stated that the hearer must rely, but that reliance need not be reasonable as at common law. Plaintiff also asserts that the statute was amended in 1983 to specifically preserve estoppel, ratification and laches. The Court found no such amendment. At oral argument Plaintiff's counsel urged that Plaintiff "didn't say (the statute) didn't apply." Plaintiff's Answer refutes this argument.

Defendants cite State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) for the proposition that a 1981 amendment to the consumer fraud statute provided an added avenue of relief for victims of securities fraud. (D.M.V. at 7). Pickrell so holds. Id. at 592, 667 P.2d at 1307. It is clear to the Court that Plaintiff's assertion that the statute is inapplicable to Defendants' state securities fraud claim is meritless.

The purpose of the Court's limited inquiry was to consider whether the "misstatements" were so blatantly against the state of the law as to suggest "undue means." The Court concludes that certain defenses were facially meritless and that Plaintiff knew, or should have known, contributory negligence was no defense to Defendants' state law claims and that the Arizona Consumer Fraud Statute is applicable to claims arising from the sale of securities. Plaintiff should have foregone its contrary arguments.

Although there is little authority construing the meaning of "undue means," and none in the Ninth Circuit, the Court concludes that a party to an arbitration proceeding raising multiple facially meritless defenses constitutes procurement of an award by "undue means" within the meaning of 9 U.S.C. § 10(a). The Court further concludes that permitting an award procured through such conduct to survive even the extremely limited judicial review of arbitration awards would render district courts little more than passive observers of this alternative dispute resolution mechanism. Congress expressed its intention to permit judicial review of arbitral awards, albeit a restrictive review, by enacting 9 U.S.C. § 10. For this Court to confirm the award in the instant case would be to abandon the arbitration process to the parties and do little more than rubber stamp an award procured through questionable, and this Court concludes "undue," means. This, the Court is unwilling to do.

3. Remand for Statement of Reasons for Award

Defendants pray in the alternative for a remand to the panel for a statement of their reasons for the award. Defendants complain about the unfairness of having no reasoning to review; but it is well settled that arbitrators

need not provide any reasons for their decisions, unless required by contract or the rules of the arbitration. E.g., Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 533 (D.C.Cir.1989) (arbitrators not required to give reasons for their decision by either the Federal Arbitration Act or the New York Stock Exchange); O.R. Secs., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742 (11th Cir.1988) (citing Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), overruled on other grounds, Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989)); see also Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1413 (11th Cir.1990) (declining to remand the case to arbitration panel for a statement of reasons because, although it would permit more active judicial review, it would defeat policy in favor of expeditious arbitration); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1102 n. 6 (9th Cir.), cert. denied, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 384 (1986) (citation omitted).

Defendants cite Ainsworth v. Skurnick, 909 F.2d 456 (11th Cir.1990) (per curiam) for the implied proposition that the Eleventh Circuit "adopted the approach of remanding the ambiguous award to the arbitrators" for clarification. This does not appear to be a fair reading of Ainsworth. In Ainsworth, the district court, in the first instance, remanded the award for the arbitrators to specify which of the five counts in the complaint had been violated. Id. at 459 (Appendix 1, D. Ct. Order). This order apparently was not appealed. The district court complained that vagueness "emasculates" judicial review. Id. That court found the award ambiguous because, if a statutory violation were found, damages were mandatory, but not if only a common law violation was found. Id. The

panel found a violation, but gave no damages. Id. When the arbitration panel issued a new order clarifying the basis of its award, the district court decided that the panel erred by not finding a violation of a certain Florida securities statute, and vacated the award "as being in manifest disregard of the law." Id. at 462.

On appeal, the Eleventh Circuit observed that there was no Florida authority construing the statute in question, and certified the question to the Supreme Court of Florida. Id. at 458. The court did not affirm the district court as suggested by Defendants. Id. The issue of remanding for clarification was not before the court and the court made no comments on the issue, except in its brief statement of the facts that where an "award can be interpreted in a variety of ways, it is normal to remand for clarification." Id. at 457. Raiford, decided two months before Ainsworth, seriously undercuts Defendants' assertion that the Eleventh Circuit has "adopted" the approach of remanding arbitration orders for a statement of the reasons for the award.

In sum, Defendants have cited no persuasive authority supporting a remand to the panel for a statement of their reasons for the award.

III. CONCLUSION

Based on the foregoing, it is

ORDERED, that Plaintiff's Application to Confirm Arbitration Award is DENIED, it is

FURTHER ORDERED, that Defendants' Motion to Vacate Arbitration Award is GRANTED, and it is

FURTHER ORDERED, that the matter is remanded for a new arbitration before a different arbitration panel.

A.G. EDWARDS & SONS, INC.,
a Delaware corporation, Plaintiff-Appellant,
v.
William F. McCOLLOUGH and Jeanene MCCOLLOUGH, husband and wife,
Defendants-Appellees.

No. 91-15839.

United States Court of Appeals, Ninth Circuit.

Before: BROWNING, PREGERSON and RYMER, Circuit Judges.

The petition for rehearing is denied.

FILED: July 28, 1992
Cathy A. Catterson, Clerk

Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

(2)

No. 92-747

In The

Supreme Court of the United States

October Term, 1992

Wm. F. McCOLLOUGH, et ux.,

Petitioners,

v.

A.G. EDWARDS & SONS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. When an unsuccessful party in a securities arbitration failed to request a Statement of Reasons as required by New York Stock Exchange rules, does a District Court have authority to vacate the award for "undue means" as defined in Title 9 U.S.C. § 10(a)(1)?

2. Where a speculative trading, margin account customer incurred significant stock losses on October 19, 1987, defaulted on a promissory note and was unsuccessful in an arbitration, does a District Court have authority to presume error and vacate an arbitration award under Title 9 U.S.C. § 10(a)(1) because it does not contain a statement of reasons?

3. Can an arbitration award be vacated where no evidence exists of fraud or misconduct or to indicate a sophisticated panel considered allegedly improper defenses raised at the commencement of the proceedings (subsequently briefed and argued by counsel), and the award contains no irregularities?

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No. 92-747

In The

Supreme Court of the United States

October Term, 1992

Wm. F. McCOLLOUGH, et ux.,

Petitioners,

v.

A.G. EDWARDS & SONS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent A.G. Edwards & Sons, Inc. requests the Court deny the Petition for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit Court has correctly applied federal law regarding the scope of judicial review of an arbitration award, where the arbitrators followed applicable arbitration procedures, no evidence of fraud or misconduct exists and the award is proper on its face. The facts and law in this case do not justify exercise of this Court's discretion to grant Certiorari pursuant to U.S. Supreme Court Rule 10.

RESPONDENT'S STATEMENT OF THE CASE

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Respondent will address misstatements of fact it its statement of the case. Petitioners Mr. and Mrs. McCollough ("McColloughs") are sophisticated investors who engaged in speculative trading. The McColloughs' Petition mischaracterizes them as unsophisticated investors whose only concern was for safety of investment. Petition at 3. Mr. McCollough was a "real estate speculator" who had twenty years previous investment experience in stocks and bonds. Testimony of Richard Anderson, Ex. B. to Statement of Facts in Support of Plaintiff's Opposition to Motion to Vacate ("Statement of Facts") (E.R. 000124); Tab 1 to Motion to Vacate Arbitration Award (E.R. 000026).[1] McColloughs' counsel admits their sophistication could have been one legitimate basis for the Arbitrators' decision. Transcript of Oral Argument at 25-26.

A. McColloughs' Trading Account

The McColloughs' 1985 and 1986 accounts at A.G. Edwards & Sons[2] ("A.G. Edwards") were options accounts. Exhibit A to Statement of Facts (E.R. 000119-22).

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[1] "ER" refers to Appellant's Excerpt of Record. The record before the District Court consisted of exhibits filed with the parties' motions, responses, and replies that have been provided in the Excerpt of Record because they have independent legal significance. All references to testimony reflect portions of the arbitration transcript that were provided to the District Court in the form of exhibits.

[2] Pursuant to U.S. Supreme Court Rule 29.1, Respondent A.G. Edwards & Sons, Inc. states it is a wholly-owned subsidiary of A.G. Edwards, Inc.

Option accounts are by nature speculative investments. The option agreement, signed by the McColloughs, acknowledges the risks:

> I understand the risks and obligations attached to the various types of options contracts and the various types of transactions that may be made in options. I have evaluated and am capable of bearing the financial risks involved and have determined that trading in options is appropriate to my investment objectives.

Exhibit A to Statement of Facts (E.R. 000119) (dated Jan. 14, 1986). The McColloughs earned a profit of $160,000 in 1986 from speculative option trading, prior to the October 19, 1987 stock market crash. Testimony of William McCollough, Ex. B to Statement of Facts (E.R. 000128-000131).

B. McColloughs Selected Arbitration

The McColloughs complain that they had no choice in the decision to arbitrate *vis-à-vis* other judicial remedies. Petition at 4, 7, 20. After the stock market crash of October 19, 1987, the McColloughs lost the equity position in their account and incurred a debit balance of approximately $250,000. Memorandum and Order at 1-2 (E.R. 000241-000242).

When the McColloughs were unable to satisfy the debit balance, A.G. Edwards agreed to forego legal action in exchange for a promissory note for deferred payments and a release from the McColloughs. Testimony of David Minnick, Ex. B to Statement of Facts (E.R. 000134-000138). The McColloughs made initial payments under the promissory note and then stopped. Memorandum and Order at 2 (E.R. 000242).

After the McColloughs defaulted, A.G. Edwards initiated suit in the United States District Court for the District of Arizona (CIV 88-1731 PHX-EHC). Statement of Facts at 2-3, ¶ 7 (E.R. 000115-000116), Ex. C to Statement of Facts (E.R. 000144-000146). The suit was dismissed upon agreement to arbitrate before the New York Stock Exchange, Inc. ("N.Y.S.E."). *Id.* The McColloughs had retained counsel and submitted a Statement of Claim pursuant to an N.Y.S.E. Uniform Submission Agreement where they acknowledged they would be bound by all applicable N.Y.S.E. Rules on October 14, 1988, and arbitration proceedings were subsequently held. *See* Appendix A; Memorandum and Order at 2 (E.R. 000242).

The sophisticated arbitration panel consisted of three members, two of whom were attorneys. Mr. Parker was a retired executive with Mountain Bell who had a bachelors degree from Occidental College in Los Angeles, and had studied graduate level work at Dartmouth College and Arizona State University. Exhibit F to Statement of Facts (E.R. 000211-000218).

The second arbitrator, Charles Lehing, was a retired executive with Chemical Bank. He had a Bachelor of Science degree from Fordham University's School of Business, a Juris Doctor from Fordham University, and had studied at Columbia University's Advance Management Program. *Id.*

The third arbitrator, Wayne Marsh, was a practicing attorney. He had a Bachelor of Science degree in Finance and Accounting from Arizona State University and Juris Doctor from Southwestern University School of Law in Los Angeles. *Id.*

C. The Arbitration Proceedings

On October 14, 1988, the McColloughs filed a Statement of Claim in letter form. Exhibit A to Defendants' Reply (E.R. 000238). This single-spaced three-page letter accused A.G. Edwards of a variety of items that were alleged in a perfunctory fashion. A.G. Edwards' fourteen affirmative defenses included contributory negligence and the applicability of the Arizona Consumer Fraud Act. Tab 13 to Motion to Vacate (E.R. 000059, 000065-000070). The McColloughs filed a twenty-five page brief, which specifically addressed A.G. Edwards' defenses regarding the Arizona Consumer Fraud Act and contributory negligence that were discussed by the District Court. Exhibit D to Statement of Facts (E.R. 000193-000195, 000203-000210).

The arbitrators heard testimony from nine witnesses, including expert testimony, during an eight-day proceeding. Exhibit A to Application to Confirm Arbitrators' Award (E.R. 000004-000005). The transcript from the proceeding exceeds 1,300 pages.

On October 2, 1990, the Arbitrators denied the McColloughs' claim and granted A.G. Edwards' counterclaim for $310,850.12 plus interest through October 1, 1990. The Arbitrators did not award attorneys' fees, costs, or expenses. *See* Appendix B.

D. The Arbitration Record

The McColloughs failed to prevail on securities fraud allegations in the N.Y.S.E. arbitration. McColloughs attempt to depict A.G. Edwards as wrongdoers by unsubstantiated statements of alleged misdeeds. Petition at 3,

19-20. The issues regarding alleged unauthorized trading, securities fraud and deceptive practices in the McColloughs' options accounts were before the Arbitrators through numerous factual and expert witnesses. These issues were highly disputed. The Arbitrators found in favor of A.G. Edwards.

Despite having no evidence, the McColloughs attempt to color the view of the Court by repeatedly insisting the Arbitrators' decision was "probably influenced" by affirmative defenses that A.G. Edwards raised. Petition at 6, 24-26. The McColloughs cannot cite to any part of the Record that shows such influence. The District Court made no such finding. Other than A.G. Edwards initially raising the defenses in response to the McColloughs' broad and indulgent Statement of Claim, the McColloughs have no basis in fact to assert their position. McColloughs' counsel thoroughly and specifically briefed and orally addressed the affirmative defenses that A.G. Edwards raised. The McColloughs failed to prove their case and have no basis to assert their current position.

Many factual scenarios fully justify the Arbitrators' decision to find in favor of A.G. Edwards. The risk assumption language in their Options Account Agreement indicated knowledge. The repetitious trading activity and documented confirmation of options trades indicated notice and understanding. The McColloughs were sophisticated investors and failed to prove their case under the applicable securities laws. After $160,000.00 of profiting by engaging in speculative trading, the McColloughs suffered the same unfortunate fate

as many investors who engaged in risky investment strategies because of the October 19, 1987, stock market crash. Transcript of Oral Argument at 25-26. The McColloughs' desire to eliminate the debit balance in their account over time when they signed a promissory note and release and commenced payments is consistent with the arbitration award.

The McColloughs voluntarily executed the promissory note and release. They imply they were misled into signing a note wholly foreign to them. Petition at 3-4. The McColloughs reviewed the note in private without the presence of any representatives of A.G. Edwards. Testimony of David Minnick, Ex. B to Statement of Facts (E.R. 000134-000138). After fully reviewing the note, the McColloughs requested a change to one paragraph of the note. *Id.* (E.R. 000136-000137); Promissory Note at 2, Application to Confirm Arbitrators' Award (E.R. 000013). These facts were presented to the Arbitrators.

E. Petitioners' Misstatement of the Law

The McColloughs assert the law requires a reasoned decision whenever a statutory claim is arbitrated to maintain at least "minimal integrity" in process. Petition at 6-7; *cf.* Petition at 15-21. Nothing in the law, the N.Y.S.E.'s procedures or the Federal Arbitration Act's legislative history requires a reasoned decision unless one is requested in a timely fashion. The McColloughs did not do so. Statement of Facts, ¶ 11 (E.R. 000116-000117); Ex. G to Statement of Facts (E.R. 000230).

1. A Reasoned Decision Was Not Requested

Prior to, during, and at the conclusion of the arbitration proceeding, the McColloughs did not request a reasoned decision or an opinion, even though the N.Y.S.E. Arbitration Procedures Manual authorizes a party to make such a request prior to the hearing date. *See* Appendix C. When the McColloughs requested an opinion after an unfavorable award, the N.Y.S.E. denied the request because it was untimely. Statement of Facts, ¶ 11 (E.R. 000116-000117); Ex. G to Statement of Facts (E.R. 000230).

2. No Fraud Or Misconduct Was Found

The District Court rejected the McColloughs' argument that A.G. Edwards' defenses constituted fraud. It recognized the McColloughs had to prove by clear and convincing evidence that any fraud must not have been discoverable upon the exercise of due diligence prior to or during the proceeding and that it was materially related to an issue in the decision. The District Court recognized that "all the alleged 'misstatements' were known to, and pointed out to the arbitrators by, Defendants' [McColloughs'] counsel." Memorandum and Order at 9 (E.R. 000249).

The District Court recognized that:

> . . . counsel for both parties presented their legal arguments in the usual adversarial way, both orally and through legal memoranda. Plaintiff [A.G. Edwards] submitted two briefs and Defendants [the McColloughs] at least one brief. Defendants' complaint might be considered simply as a difference of opinion on the law; that is,

> Defendants believe they should have won on the law.

Id. at 9-10 (E.R. 000249-000250).

The District Court did not find any causation between the award and the defenses; nor did it find the defenses were material or that A.G. Edwards had acted in bad faith.

3. Note and Release Defense Is Fact Intensive

The McColloughs misstate that the note and release defense was one of the defenses upon which the District Court vacated the arbitration award. Petition at 5-6, 23-25. The District Court only opined on two of the defenses – contributory negligence and Arizona Consumer Fraud Act. Memorandum and Order at 8-9 (E.R. 000249). The note and release legal defense is valid if supported by credible testimony. Under Arizona law, a release of legal claims is enforceable where there is a mutual agreement containing a release executed by the parties that is supported by consideration. *See, e.g., McGrath v. Bill Johnston Golf Properties, Inc.*, 13 Ariz. App. 49, 474 P.2d 56 (1970).

As a factual issue, this dispute went before the Arbitrators. The Arbitrators found against the McColloughs who testified they had executed and began making payments on the note and then defaulted.

The McColloughs attempted to expand this issue in their Answering Brief before the Ninth Circuit Court of Appeals ("Answering Brief") at 23. However, the McColloughs failed to cross-appeal to properly raise an

issue on the note and release defense. Memorandum and Order at 8-9 (E.R. 000249); *see* Fed. R. App. P. 4(a).

4. Dissenting Opinions Are Not The Law

The McColloughs inappropriately place great reliance on dissenting opinions, such as asserting that the view expressed by the *Wilko v. Swan* minority is now the law. *See* Petition at 7-15, 28-29 ("Now this Court has aligned itself with the Second Circuit's approach to *Wilko*"). The Petition ignores case law in this Court regarding the arbitration process, and law in various courts interpreting the Federal Arbitration Act as applied to this case by the Ninth Circuit. That law uniformly limits judicial review of arbitral decisions and does not permit courts to "presume" error in an arbitration award because it does not contain reasons.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

This case raises a limited issue as to what constitutes "undue means" as used in Section 10(a)(1) of the Federal Arbitration Act[3] to justify vacating an award that is proper on its face. 9 U.S.C. §§ 1 *et seq.* Section 10(a)(1) authorizes vacatur only if "the award was produced by corruption, fraud, or undue means."

[3] Section 10(a) was amended in 1990. Section 10(a)(1) used to be Section 10(a). No substantive changes to Section 10(a) were made in the amendment.

A.G. Edwards raised two affirmative defenses in arbitration pleadings in response to a broad and indulgent Statement of Claim written in letter form, which asserted various state and federal statutory and common law arguments. The McColloughs addressed the defenses in briefs to the arbitration panel. No evidence was presented to the District Court that the Arbitrators relied upon or even considered the defenses in reaching their decision. The District Court made no finding of causation or bad faith in its decision. It found, instead, that merely raising the defenses constituted undue means.

The District Court vacated the award even though its own findings contradict a well-established test for vacatur under Section 10(a). The test for vacatur requires a finding by clear and convincing evidence that:

(1) The McColloughs did not know of the allegedly erroneous defenses during the arbitration; and

(2) The defenses materially related to an issue in the arbitration decision, *i.e.*, a causal connection to the award exists.

The Ninth Circuit Court of Appeals found the District Court had no authority for its conclusion and was in conflict with the law of the Circuit.

II. THIS DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND DOES NOT PRESENT A NOVEL QUESTION OF LAW

Pursuant to the Supreme Court Rules, Rule 10.1, special and important reasons do not justify granting a review on writ of certiorari here. At no place in the

McColloughs' Petition do they show that the Ninth Circuit's decision in this case is in conflict with the decisions of any other United States Court of Appeals on the same matter. *See* U.S. Supreme Ct. R. 10.1(a). The federal courts of appeal universally agree that arbitrators are not required under the Federal Arbitration Act, or by common law, to render a reasoned decision. *E.g., Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991) (employment arbitration); *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990) (securities arbitration).

The Ninth Circuit decision has not departed from the "accepted and usual course of judicial proceedings," such that this Court should exercise its power of supervision. *See* U.S. Supreme Ct. R. 10.1(a). The Ninth Circuit Court of Appeals expressly found that the District Court had exceeded its authority and departed from the federal courts' accepted and usual limited review of arbitration awards. *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir.), *petition for cert. filed*, No. 92-747 (Oct. 26, 1992) (same case under appeal by McColloughs' Petition).

The Ninth Circuit has not decided a novel question of federal law. U.S. Supreme Ct. R. 10.1(c). As McColloughs' Petition indicates, this Court has extensively examined the same issues present here. This Court has repeatedly upheld the principle that federal judicial review of arbitration awards is limited. *See, e.g., Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232, 107 S. Ct. 2332, 2340 (1987). Moreover, this Court recognizes that "[a]rbitrators have no obligation to the court to give their reasons for an award." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36,

58, 94 S. Ct. 1011, 1024 (1974) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S. Ct. 1358, 1361 (1960)). The Ninth Circuit decision here does not conflict with the applicable decisions of this Court. *See* U.S. Supreme Ct. R. 10.1(c).

III. THE PETITIONERS' LEGAL POSITION IS CONTRARY TO THE FEDERAL ARBITRATION ACT

The McColloughs fail to demonstrate that "undue means" was the basis for the arbitration award.[4] The cornerstone of the McColloughs' Petition is that the existing state of the law is wrong and should be judicially changed. McColloughs are unhappy because a majority of the Arbitrators found against them on the facts.

A. Limited Judicial Review of Arbitration Decisions Is the Law Despite the Court's Overruling of *Wilko v. Swan*

The McColloughs have chosen their forum and litigated their substantive claims. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct.

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[4] The trial judge stated little precedent existed in the entire country and none in the Ninth Circuit to determine what constitutes "undue means." Memorandum and Order at 12 (E.R. 000252). As cited in A.G. Edwards' Opening Brief for the Ninth Circuit Court of Appeals, and despite the District Court's assertion, the Ninth Circuit has considered the meaning of "undue means" as *deliberately disregarding* what the arbitrators know to be the law. Opening Brief at 13-14 (citing *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)).

1917, 1920 (1989). The McColloughs misread the *Rodriguez de Quijas - McMahon - Mitsubishi* line of cases for the proposition that the Court now requires reasoned decisions for certain arbitration cases (cloaked in the language of "greater judicial review"). *Compare Id.; McMahon*, 482 U.S. at 232, 107 S. Ct. at 2340; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985).

The Court's overruling of *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182 (1953), does not result in the conclusion that an arbitration award without a statement of reasons violates the Federal Arbitration Act. The minority opinion contained several different propositions.

The main issue of *Wilko* was whether an agreement to arbitrate securities claims is enforceable. *Id.* at 430, 74 S. Ct. at 184. The Court held that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." *Id.* at 435, 74 S. Ct. at 186. The majority then went on to find that, if a case is submitted to arbitration, power to vacate an award is limited. *Id.* at 436, 74 S. Ct. at 187. Only the non-waiver of forum selection holding of the *Wilko* decision was overruled. *Rodriguez de Quijas*, 490 U.S. at 479-82, 109 S. Ct. at 1919-20. A court's power to review arbitration awards is limited. *See Id.; McMahon*, 482 U.S. at 232, 107 S. Ct. at 2340.

The *Rodriguez de Quijas* Court expressly upheld the enforceability of pre-dispute arbitration agreements in federal securities-related claims. 490 U.S. at 479-81, 109 S. Ct. at 1919-20. This Court abandoned any notion that courts should be hostile to an arbitration proceeding. *Id.*

at 480, 109 S. Ct. at 1920. In overruling *Wilko*, the *Rodriguez de Quijas* Court stated:

> To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Id. at 481, 109 S. Ct. at 1920.

B. Federal Policy Favors Arbitration

"The [Federal] Arbitration Act establishes a 'federal policy favoring arbitration.'" *McMahon*, 482 U.S. at 226, 107 S. Ct. at 2337. Nothing in the *Rodriguez de Quijas – McMahon – Mitsubishi* line of cases suggests that reasoned decisions are necessary to protect substantive rights in securities-related arbitration. Indeed, the Court in *Rodriguez de Quijas* found "the arbitration process does not inherently undermine *any* of the substantive rights afforded to petitioners under the Securities Act." 490 U.S. at 486, 109 S. Ct. at 1922 (emphasis added). The *McMahon* Court said that "we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 482 U.S. at 232, 107 S. Ct. at 2340. Moreover, "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354; *accord, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ___, 111 S. Ct. 1647, 1652 (1991).

In McColloughs' case these substantive claims were vigorously litigated. The McColloughs failed to meet their burden of proof before the arbitration panel and have not met the requirements of 9 U.S.C. § 10(a)(1) to justify vacating the award.

> Sometime ago this Court expressed 'hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created,' . . . , and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

Mitsubishi, 473 U.S. at 626-27, 105 S. Ct. at 3354 (citations omitted).

Recent federal courts of appeals decisions have upheld the federal policy favoring arbitration. *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992), expresses the judicial deference that still prevails in federal courts. Absent a sound statutory basis, courts may not overturn an arbitrator's award. *Id.* at 540.

> Because of the speed and informality of arbitration proceedings, 'whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound

> statutory basis for doing so.' . . . *Forsythe International* binds us to review the plaintiffs' challenge solely for errors specified in § 10.

Id. (quoting *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990)). The McColloughs desire a less strict standard of judicial review. However, any expanding of judicial review would undermine the federal policy toward arbitration and open the floodgates to additional litigation. *Id.*

Similarly, in *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, the Eleventh Circuit Court of Appeals required some showing in the record, "other than the result obtained, that the arbitrators knew the law and expressly disregarded it." 857 F.2d 742, 747 (11th Cir. 1988). Failing to give a reasoned decision or opinion is not grounds for vacating an arbitration award. *Id; accord San Martine Compania de Navegacion*, 293 F.2d at 801 (undue means exists only if the arbitrators deliberately disregarded the law). No evidence exists that this occurred!

The *Rodriguez de Quijas – McMahon – Mitsubishi* line of cases affirm the Court's confidence toward arbitration in securities-related cases and mandates a plain reading of the Federal Arbitration Act, which only requires vacatur if the evidence shows the arbitrators decided a case based on fraud, undue means, or by exceeding their authority. 9 U.S.C. § 10(a).

C. Arbitration Awards Are Presumed Valid

In *Sargent v. Paine Webber Jackson & Curtis, Inc.*, the Court of Appeals explained more than a "mere possibility" of an error *must exist* and that an arbitration award without an explanation *did not justify* vacating the award. 882 F.2d 529, 532 (D.C. Cir. 1989). It also said that so long as "the record disclosed a permissible route to the stated conclusion," then a court *must* uphold the arbitration award. *Id.*; *see, e.g., Lenslite Co. v. Zocker*, 95 Ariz. 208, 388 P.2d 421 (1964) (presuming correctness of trial court decisions on appeal).

> Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

McMahon, 482 U.S. at 232, 107 S. Ct. at 2340. Even when a party's claim is grounded on statutory rights, arbitration is valid and enforceable. *Id.* at 226, 107 S. Ct. at 2337. Courts presume an arbitration award is valid unless otherwise proven.

State trial court appeals in ordinary litigation provide an excellent analogy. When a trial court decides an issue but does not state its reasons, the court of appeals will presume the decision was correctly made. *Lenslite Co.*, 95 Ariz. at 216, 388 P.2d at 426; *Melton v. Lehmann*, 794 P.2d 650, 653 (Idaho Ct. App. 1990). To uphold that presumption, appellate courts will use any reasonable evidence in the record that might support the decision. *Myers-Leiber Sign Co. v. Weirich*, 2 Ariz. App. 534, 536, 410 P.2d 491, 493

(1966). This is true even though "substantive rights" have been litigated. *Cf.* Petition at 15. But appellate courts will *not* go beyond the record. *Myers-Leiber*, 2 Ariz. App. at 536, 410 P.2d at 493.

There are many permissible routes for the Arbitrators to have found in favor of A.G. Edwards. The McColloughs were sophisticated investors and failed to prove their case under the applicable securities laws. Transcript of Oral Argument at 25-26. The McColloughs desired to eliminate the debit balance in their account over time and signed a promissory note and commenced payments. The McColloughs' account records and option profits reflect an understanding of trading risks.

To overturn an arbitration award, proper on its face and with no facts to indicate the law was not applied correctly, invites courts to reject awards when they do not like or agree with an arbitration panel's decision. This will totally erode any certainty of an apparently valid award where only a small part of the arbitration record is reviewed. *See, e.g. Sargent*, 882 F.2d at 532.

When faced with a district court that had remanded an arbitrator's award for an explanation, the District of Columbia Circuit in *Sargent* expressly rejected expanding the law stating that:

> If courts required an explanation on account of the mere possibility of such an error, they would in effect be requiring an explanation almost universally. The Supreme Court has observed that arbitral awards may be made without explanation.

Id. (citing *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, as still valid on that point of law).

The McColloughs assert that "strong public policy" requires arbitrators to decide cases "in accordance with applicable statutory law." Petition at 19-21. McColloughs have no evidence that legal error occurred. They ignore the legal presumption that arbitration awards are decided in accordance with applicable statutory law absent evidence to the contrary. A decision in one party's favor creates a presumption that the arbitrators found for that party on "every controverted fact." *Lenslite Co.*, 95 Ariz. at 216, 388 P.2d at 426.

Only when facts appear in the Record that make it "probable that the Arbitrators committed an error" is the District Court justified in vacating the award. *Sargent*, 882 F.2d at 532. The McColloughs failed to meet this burden of proving that the Arbitrators made their decision on invalid grounds. *See McMullin v. Palmer*, 40 F.R.D. 368, 372 (N.D. Miss. 1966); *Moran v. Pittsburgh-Des Moines Steel Co.*, 86 F. Supp. 255, 284 (W.D. Penn. 1949), *rev'd on other grounds*, 183 F.2d 467 (3d Cir. 1950).

To satisfy their burden of proof, McColloughs must prove by clear and convincing evidence that the alleged impropriety was the basis of the Arbitrators' decision. *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986). A "mere possibility of such an error" is not sufficient. *Sargent*, 882 F.2d at 532; *see Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 35 (2d Cir. 1951).

D. McColloughs Seek Judicial Amendment to the Federal Arbitration Act

Congress must modify federal acts, not the courts. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015 (1978). The Federal Arbitration Act sets out the basis for vacatur of an arbitration award. 9 U.S.C. § 10(a). The McColloughs urge this Court, using a misapplication of the *Rodriguez de Quijas – McMahon – Mitsubishi* line of cases, to go beyond § 10(a) and second guess the Arbitrators due to the absence of a reasoned decision. Petition at 7-15. This requires that the law be changed. But only Congress can amend a federal enactment. *See Mobil Oil*, 436 U.S. at 625, 98 S. Ct. at 2015.

IV. THE ARBITRATION DECISION IS CONSISTENT WITH APPLICABLE LEGAL PRINCIPLES

A. McColloughs Had Adequate Opportunity to Protect Substantive Rights

The McColloughs argue for a reasoned decision because their account agreement did not require them to waive their substantive rights. They sarcastically set forth revised contract language at page 29 of their Petition indicating their unsupported theory that Arbitrators disregarded the law. Petition at 11, 15 (quoting *Rodriguez de Quijas*, 490 U.S. at 481, 109 S. Ct. at 1920), 16, 18. This argument fails for several reasons.

First, the McColloughs had the opportunity to counterclaim in federal court when A.G. Edwards filed the suit on their promissory note. *See* Fed. R. Civ. P. 13; Letter

to Lewis from Herf (E.R. 000144); Letter to Herf from Lewis (E.R. 000145). They chose to arbitrate instead.

Second, the McColloughs had the opportunity to request a reasoned decision prior to issuance of the award. *See* Statement of Facts, ¶11 (E.R. 000116-000117); Ex. G to Statement of Facts (E.R. 000230); Letter from Edward Morris, NYSE, to Lewis (E.R. 000101). They did not.

Third, they were represented by counsel who vigorously argued and briefed their factual and legal position. The McColloughs waived their right to request an opinion after the fact. *See Greenwell v. Spellman*, 110 Ariz. 192, 194, 516 P.2d 328, 330 (1973); Arbitration Procedures Manual at 16, Ex. G to Statement of Facts (E.R. 000227); Memorandum and Order at 13 (E.R. 000253). Now they are estopped from requesting greater judicial scrutiny. *Greenwell*, 110 Ariz. at 194, 516 P.2d at 330.

B. An Arbitration Award Need Not Contain Reasons

The securities industry arbitration rules do not require a reasoned decision. Nor are securities arbitrations "special cases."[5] *See* Petition at 16 n.4. The rules for "Arbitration Procedure" clearly state:

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[5] The McColloughs cite numerous lower court decisions for the proposition that "greater judicial scrutiny" is needed. Petition at 16-17 n.4. Again, the McColloughs simply misapply cases that have reversed arbitration awards for manifest legal error. For instance, the McColloughs cite *Allen v. Interinsurance Exch. of the Auto. Club of S. Cal.*, 80 Cal. Rptr. 247 (Ct. App. 1969), as requiring a court to review the arbitration decision for conformity with the rules of law. Petition at 17 n.4. However, in *Allen*,

> . . . Arbitrators are not required to write opinions or provide reasons for the award. A party, however, may request an opinion. *This request should be made no later than the hearing date.*

N.Y.S.E. Arbitration Procedures Manual at 16, Ex. G to Statement of Facts (E.R. 000227) (Appendix C) (emphasis added).[6] Arbitration Procedures Manual at 16, Ex. G to Statement of Facts (E.R. 000227); *see* 3A H. Bloomenthal, *Securities and Federal Corporate Law* § 8.30[2][f], at 8-154.21 (1991) ("award does not have to include a reasoned opinion").[7]

C. The "Record" Does Not Suggest Legal Error

1. Undue Means Was Not Proven as Matter of Law

Under federal law, "undue means" requires that the Arbitrators deliberately disregard what they know to be the law. *San Martine Compania de Navegacion*, 293 F.2d at 801. Section 10(a)(1), which authorizes vacatur if "the

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the findings and conclusions showed the erroneous application of law. *Allen*, 80 Cal. Rptr. at 250. The District Court before the Court here had no evidence in the Record nor any findings of the Arbitrators to conclude the Award was erroneous much less the result of undue means.

[6] The arbitration rules of the National Association of Securities Dealers ("NASD") also specify exactly what Arbitrators *must* include in an arbitration award, but the rules do not require a reasoned decision. Code of Arbitration Procedure, *NASD Manual* (CCH) ¶3741(e) (1992) (Appendix D).

[7] By analogy, Arizona does not require its state courts to give a reasoned decision except upon request before trial. Ariz. R. Civ. P. 52(a). Failure to request such findings acts as a waiver upon the parties. *E.g.*, *Greenwell*, 110 Ariz. at 194, 516 P.2d at 330.

award was procured by corruption, fraud, or undue means," requires that the party challenging the award prove:

(1) By clear and convincing evidence that the objectionable conduct was not known or discoverable upon the exercise of due diligence prior to the arbitration; and

(2) That the conduct related to a material issue in the arbitration.

LaFarge Conseils, 791 F.2d at 1339 (analyzing fraud); 9 U.S.C. § 10(a).

As the Ninth Circuit noted in 1961, "undue means" is found where the arbitrators know the law, but deliberately disregard it. *San Martine Compania de Navegacion*, 293 F.2d at 801. The meaning is evident in the underlying purpose of § 10(a), which shows Congress' desire to provide for an *impartial* arbitration. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147, 89 S. Ct. 337, 338 (1968). Undue means is to be construed with respect to conduct which could cause partiality, just like corruption (bribery) or fraud (lying). No instances of undue means, such as witness tampering, deliberately disregarding the law, partiality, bribery, *ex parte* contact, or dishonesty are even hinted in this proceeding, *i.e.*, no undue means was exerted by A.G. Edwards on any panel member.

In *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104 (N.D. Ill. 1980), the element of bad faith was mandated where the district court refused Shearson's request to vacate the award for undue means. The court stated:

> 'Undue means,' in the context of section 10(a) of the Act, has not been defined by the courts. The courts, however, appear to interpret 'undue means' in conjunction with terms 'corruption' and 'fraud' found in section 10(a) and thus *'undue means' requires some type of 'bad faith' in the procurement of the award.*

493 F. Supp. at 108 (emphasis added). In *Liang*, Liang instituted the arbitration proceeding when Shearson terminated his employment. *Id.* at 105. After the award was rendered in favor of Liang, Shearson learned that Liang had made misstatements on his employment application and sought to vacate the decision. *Id.* at 106.

The court rejected Shearson's claim of undue means because Shearson was unable to show it could not have discovered this evidence prior to the arbitration hearing. *Liang*, 493 F. Supp. at 109 (citing *Kirschner v. West Co.*, 247 F. Supp. 550, 553 (E.D. Pa. 1965) and *Karppinen v. Karl Kiefer Machine Co.*, 187 F. Supp. 32, 35 (2d Cir. 1951)). The Ninth Circuit has cited *Liang* with approval. *LaFarge Conseils*, 791 F.2d at 1339; *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982).

In *Forsythe International*, the Fifth Circuit reversed the district court's vacatur on fraudulent grounds alleging panel misconduct for refusing to hear material evidence. 915 F.2d at 1023. The Fifth Circuit found that the issue of discovery abuse was raised during the arbitration proceedings. The court deferred to the arbitrators' control of their own proceedings:

> Misconduct, even when deemed irrelevant to the merits, may nevertheless subject offenders to other sanctions. Arbitrators may, for example,

> devise appropriate sanctions for abuse of the arbitration process.

Id. at 1023 n.8.

In *Foster v. C.F. Turley*, 808 F.2d 38 (10th Cir. 1986), the Tenth Circuit remanded a vacatur where it was unclear if the fraud could have been discovered prior to the arbitration proceedings by exercising due diligence. *Id.* at 42. If the failure to disclose material facts could have been discovered, then vacatur would not be granted.

The Second Circuit has held that deliberately attempting to prejudice the panel did not constitute undue means, where the conduct was open, challenged by the opposing party, and the panel claimed it was not prejudiced. *Drayer v. Krasner*, 572 F.2d 348, 351 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978).

Drayer involved a former registered representative who claimed undue means because the prevailing brokerage firm offered to the arbitrators a copy of an indictment by a federal grand jury of the registered representative, even though he had not been convicted. 572 F.2d at 351-52. Rejecting his contention, the court stated:

> The 'undue means' of (a), when read in conjunction with 'corruption' and 'fraud,' does not cover a case where a party openly offered evidence even for the sole purpose of causing prejudice, at least when, as here, the arbitrators declined to receive it and stated that they had not been prejudiced and would act only on the evidence before them. The experienced businessmen on the arbitration panel could surely be relied upon . . .

572 F.2d at 352 (footnote omitted).

In *Karppinen*, 187 F.2d at 35, an arbitration award was confirmed where the party seeking vacatur claimed the award was induced by perjured testimony. Assuming perjured testimony constituted fraud under Section 10(a), the court noted that,

> it necessarily raises the issues of credibility which have already been before the arbitrators once. . . . [T]herefore the party relying on it must first show that he cannot have discovered it during the arbitration, else he should have invoked it as a defense at that time.

187 F.2d at 35. The Second Circuit refused to vacate the award because the bearing of the issues before the arbitrators and that of the perjured testimony was "extremely remote . . . [a]nd cannot reasonably be thought to have affected their decision in determining any relevant questions before them. At most, it could only bear on a possible impeachment . . . as to collateral matters. . . . " *Id.* *Karppinen* was cited with approval in the Ninth Circuit decision *Dogherra*, 679 F.2d at 1297.

2. A Note And Release Is A Viable Legal Theory

The note and release defense was not found meritless by the District Court and involved vigorously disputed facts at the hearing. The legal defense is valid if supported by credible testimony. The defense is fact intensive. The Arbitrators had many facts before them in the multi-day proceeding.

Under Arizona law, a release of legal claims is enforceable. *See, e.g., McGrath*, 13 Ariz. App. 49, 474 P.2d 56. As

the McColloughs acknowledged in their Answering Brief, "waiver is a voluntary and an intentional relinquishment of a *known* right." Answering Brief at 23 (emphasis in original). This is a factual issue.

Release is valid on a federal securities-related claim if a person has knowledge of the claim. *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984). Knowledge is a fact question. The McColloughs, represented by attorneys at all stages of the arbitration, had full opportunity to present their factual evidence. These are factually disputed claims, which clearly provide an independent basis to sustain the award as the Arbitrators chose not to believe McColloughs' evidence.

V. CONCLUSION

The McColloughs' Petition for Writ of Certiorari must be rejected as the Ninth Circuit Court of Appeals correctly applied existing law, and its decision does not conflict with other circuits. There was no showing of undue means to justify vacating an arbitration award. Petitioners' arguments for the discretionary exercise of jurisdiction are those of a disappointed litigant who was unhappy that their case was rejected by a majority of a three-member arbitration panel. Special and important reasons contained in United States Supreme Court Rule 10.1(a) and (c) have not been met. The decision of the Ninth Circuit is not in conflict with another United States Circuit Court of Appeals on the same matter. There is no departure from accepted or usual course of judicial proceedings, no unsettled question of federal law and there

has been no decision rendered by the Ninth Circuit on a federal question that conflicts with any holdings of the U.S. Supreme Court.

A.G. Edwards requests that this Court deny the Petition for Writ of Certiorari and grant A.G. Edwards its attorneys' fees pursuant to the terms of the options account agreement and promissory note.

RESPECTFULLY SUBMITTED this 25th day of November, 1992.

CHARLES W. HERF
Counsel of Record
QUARLES & BRADY & FANNIN
One East Camelback
Suite 400
Phoenix, Arizona 85012
(602) 230-5500
Attorneys For Respondent

APPENDIX A

NEW YORK STOCK EXCHANGE UNIFORM SUBMISSION AGREEMENT

UNIFORM SUBMISSION AGREEMENT

Before the New York Stock Exchange

In the Matter of the Arbitration Between

Name of Claimant(s)

WILLIAM F. McCOLLOUGH

JEANENE McCOLLOUGH

and

Name of Respondent(s)

A.G. EDWARDS & SONS, INC.

GREG U. SMITH

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1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers and all related counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgement and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

CLAIMANT(S) SIGNATURE

/s/ William F. McCollough
WILLIAM F. McCOLLOUGH

/s/ Jeanene McCollough
JEANENE McCOLLOUGH

STATE OF ARIZONA)
: ss.:
COUNTY OF MARICOPA)

On the 14th day of October, 1988, before me personally appeared WILLIAM F. McCOLLOUGH and JEANENE

McCOLLOUGH to me known and known to me to be the person(s) who executed the foregoing instrument, and (they) acknowledged to me that (they) executed the same.

/s/ Karen L. Ingles
Notary Public

My Commission Expires April 10, 1992

RESPONDENT WILL EXECUTE A UNIFORM SUBMISSION AGREEMENT IDENTICAL TO THE UNIFORM SUBMISSION AGREEMENT EXECUTED BY CLAIMANT UFP

APPENDIX B

ARBITRATION AWARD

New York Stock Exchange
In the Matter of Arbitration Between NYSE

Case:

William F. McCollough and Jeanene McCollough vs. A.G. Edwards & Sons, Inc. and Greg U. Smith

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Date Filed: *11/10/88*
First Scheduled: *5/15/89*
Decided: Oct 2, 1990

Case Summary:*

Customers vs. Member Firm and Registered Rep alleging unsuitability, failure to disclose risks, failure to supervise, fraud and RICO violations.

10/1/90

Sessions: *(14)*
Discovery Conferences 4/10 & 5/14/90 (1&2), 7/17-20/90 (3-9), 9/20 & 21/90 (10-13)

Claim Data

Claim	$1,000,000+	CC 3rd Pty	$237,425.00
Punitive	*yes*	Punitive	*plus interest and expenses*
Atty Fees	*yes*	Atty Fees	*yes*
Deposit	*$1,000.00*	Deposit	

Award Data

Award	0	CC 3rd Pty	310,850.12 plus int.
Punitive	0	Punitive	0
Atty Fees	0	Atty Fees	0
Costs	*$6,750.00*	Costs	*$6,750.00*

Decision:* The undersigned arbitrators have decided and determined in full and final settlement of all claims between the parties that:

> Claimants' claim is denied and Respondent's counterclaim is granted in the amount of $310,850.12 which includes interest through October 1, 1990. Thereafter interest shall accrue at the rate stated on the promissory note until paid. Each party shall bear their own attorney's fees, costs and expenses.

Remarks:*

> Arbitrator Wayne P. Marsh disagrees with the majority and would grant Claimants' claim plus expenses and treble damages.

Arbitrators D = Dissents

WAYNE P. MARSH – Dissenting	/s/ Wayne P. Marsh Signature
J.W. PARKER	/s/ J.W. Parker Signature
CHARLES C. LEHING	/s/ Charles C. Lehing Signature

Phoenix	*AZ*	Oct. 2, 1990
City	State	Date

*Additional Pages May be Used if Necessary.

APPENDIX C

NEW YORK STOCK EXCHANGE ARBITRATION PROCEDURES MANUAL

Pages 15-16 of 20

HOW ARE THE PARTIES NOTIFIED OF THE ARBITRATORS' DECISION?

> When the arbitrators have reached their decision and have signed an award, copies will be mailed to the parties. The award will contain the names of the parties, a summary of the issues in controversy and the issues resolved, as well as the damages requested and awarded and the names of the arbitrators. The awards will be made publicly available. *Arbitrators are not required to write opinions or provide reasons for the award. A party, however, may request an opinion. This request should be made no later than the hearing date.* Some sponsoring organizations delete from the public version of awards information that identifies either the arbitrators or the parties. The decision of the arbitrators is final; that is, the decision is subject to review by a court only on a very limited basis.

(emphasis added).

APPENDIX D

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. MANUAL CODE OF ARBITRATION PROCEDURE

Pages 3723, 3724

INTERPRETATION OF CODE ¶ 3735

Sec. 35. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code [of Arbitration Procedure] which interpretation shall be final and binding upon the parties.

AWARDS ¶ 3741

Sec. 41 (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such a manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

(e) The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.

(f) All awards involving public customers and their contents, excluding the names of the arbitrators, shall be made publicly available. A party to an arbitration involving a public customer may request that the Director of Arbitration provide copies of all awards rendered by the arbitrator(s) chosen to decide its case. A party wishing to obtain such information must notify the Director of Arbitration with three (3) business days of receipt of notification of the identity of the person(s) named to the panel.

[Amended effective May 10, 1989; April 26, 1991; May 7, 1991; January 8, 1992]